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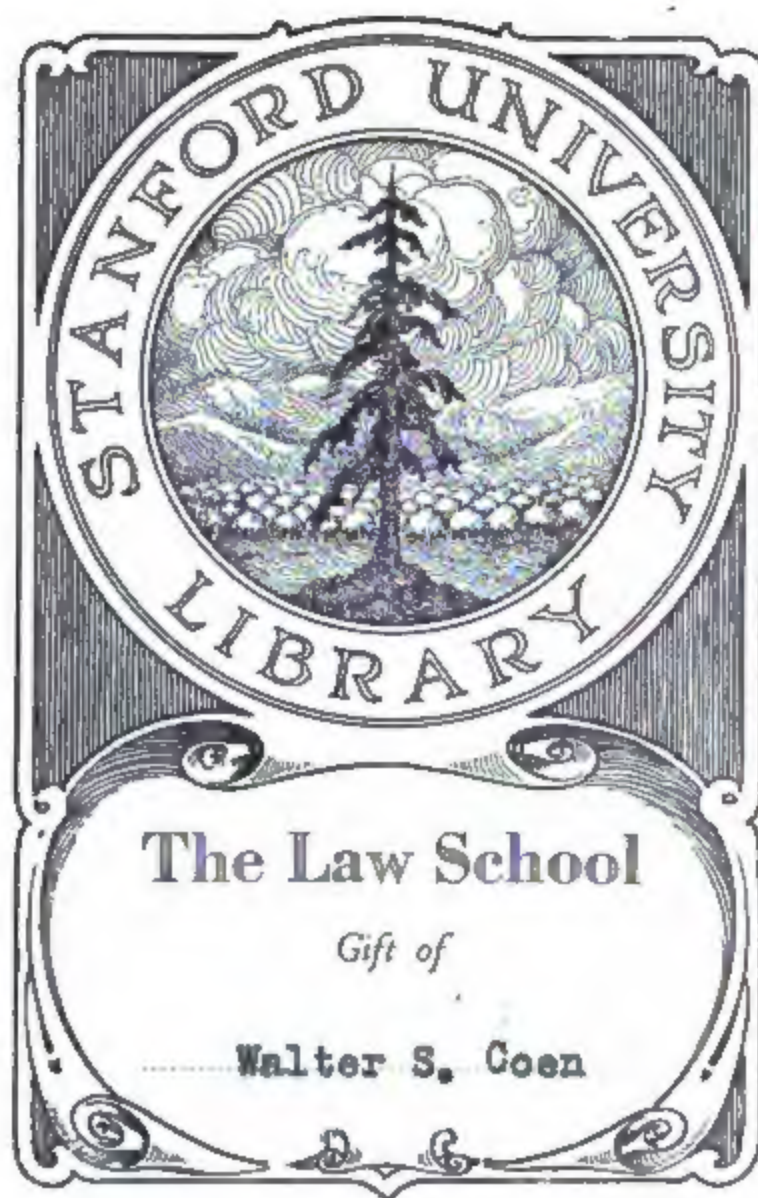
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**A TREATISE**  
**ON THE**  
**RESCISSION OF CONTRACTS AND**  
**CANCELLATION OF WRITTEN**  
**INSTRUMENTS**

**BY**  
**HENRY CAMPBELL BLACK, LL. D.**

**AUTHOR OF BLACK'S LAW DICTIONARY,  
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INCOME TAXES, CONSTITUTIONAL LAW,  
INTERPRETATION OF LAWS,  
JUDICIAL PRECEDENTS,  
ETC.**

**VOLUME 1**

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# PREFACE

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IT HAS been the author's purpose to present to the profession, in the following pages, a complete and comprehensive discussion of the rules and principles governing the rescission of contracts and the cancellation of written instruments, and to illustrate these rules and their application to the multifarious transactions of modern business life by references to the many thousands of cases which have dealt with one or more aspects of the general subject.

The first part of the work, extending from Chapter I to Chapter XIV, contains a detailed examination of the various causes or grounds which justify the rescission or repudiation of a contract by one of the parties to it, or which warrant a court in ordering its annulment or cancellation. This has involved an exhaustive consideration of the more usual subjects of fraud, misrepresentation, and mistake, but the exposition of the grounds of rescission has also been made to include the subjects of want, failure, or inadequacy of consideration, deficiency in the quantity or quality of the subject-matter, failure, refusal, or impossibility of performance, duress and undue influence, insanity and intoxication, infancy, illegality or immorality in the subject of the contract, and the bankruptcy or insolvency of a party.

The second part of the book, including Chapters XV to XXVI, consists of a minute application of the general rules and principles to various classes of contracts. Here the discussion is not general but specific. The various kinds of contracts are taken up in succession, and their rescission or cancellation examined, with special reference to the inherent peculiarities and legal aspects of each. Thus are passed in review executed and executory contracts, the contracts of governments and municipal corporations, maritime contracts, contracts of brokerage and agency, of suretyship and guaranty, partnership agreements, engagements of marriage, the executed contract of marriage, subscrip-



tions to corporate stock, subscriptions to charities and to business enterprises, contracts for work or hire of services, the tenure of public and private office, express trusts and settlements, licenses, contracts of release, compromise, and settlement, notes and bills, sales of personal property, the sale and exchange of real estate, judicial and other public sales, leases of realty, mining contracts and leases, policies of insurance, and gifts and donations.

The third division of the work, occupying Chapters XXVII to XLI, deals with the adjective or administrative law of rescission, or the general subject of when and how it may be effected. Herein are considered the effect of a reservation of the right to rescind, the manner of effecting a rescission by the mutual consent of the parties, the time within which a justifiable rescission must be claimed and the effect of laches or unreasonable delay, the grounds on which a defense of waiver, estoppel, or ratification may be set up, the persons entitled to rescind, the conditions precedent which they must observe, the circumstances which determine whether a rescission must be entire or may be partial, the subject of restitution or the restoration of the status quo, and the effect of intervening rights of third persons. Finally, the proceedings for rescission by the order or decree of a court are considered in detail, including the questions of jurisdiction, and of the justification for the interference of a court of equity, and also the parties to the action, the pleadings, practice, and evidence, the judgment or decree, and the operation and effect of a rescission thus brought about.

No major subject of the law can be said to have reached a stage of crystallization, with all its rules immutably set, at any given time. Necessarily the law must grow, by taking cognizance of new conditions and new problems, in keeping pace with the development of industrial and commercial life. But if its growth is to be real and vital, it must also expand from within. Gradually it must free itself from the shackles of convention, and bring its pronouncements into accord with the evolution of the social conscience and the progress of a new and more enlightened morality. The subject of rescinding and canceling con-

tracts and other business engagements is no exception to this principle. On the contrary, it would not be easy to find a more perfect example of it than is afforded by the gradual but sure triumph of the humane and sensible doctrines of equity over the inflexible rules of the common law, as applied to contracts induced by fraud and falsity. In such cases, the Procrustean standard of the ancient law, which refused all relief to the unhappy suitor unless he could show that he had exercised "due care and diligence" to avoid being cheated, or that his conduct had been that of a "reasonably prudent man," was absurd, because it is precisely the credulous and unwary who are the easy victims of fraud and who need the protection of the courts. But now, fortunately, this outworn notion has almost everywhere given place to the better rule which we may venture to call the "doctrine of comparative intelligence,"—a doctrine which moves the courts to probe the circumstances of each particular case, instead of judging all by a hard-and-fast rule, which allows no advantage to a trickster because of his superior cunning, and no disadvantage to a dupe because of his careless or confiding nature or his lack of experience or shrewdness, which exacts of a defrauded person no higher degree of care or prudence than he, as an individual, might fairly have been expected to exercise, and which severely discountenances the sharper's plea that the man he has wronged was negligent in failing to detect the trick,—a doctrine, in short, which teaches, as observed by the Supreme Court of Vermont, that "no rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."

HENRY CAMPBELL BLACK.

WASHINGTON, D. C., 1916.

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## CHAPTER I

## DEFINITIONS AND GENERAL PRINCIPLES

- § 1. Rescission Defined.
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§ 1. Rescission Defined.—To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made.<sup>1</sup> Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by

<sup>1</sup> Powell v. F. C. Linde Co., 29 Misc. Rep. 419, 60 N. Y. Supp. 1044; Hurst v. Trow Printing & Bookbinding Co., 2 Misc. Rep. 361, 22 N. Y. Supp. 371. Etymologically, to "rescind" is to sever or cut off or cut apart. The metaphor involved in the word "obligation" is that of a binding up or tying together, as, where a party "obliges" himself in a bond, the figure is that of his being bound to its performance as with cords, and so the "obligation" of a contract is the union of the parties with respect to its mutual terms and conditions, as if they were physically tied to each other. The "rescission" of an obligation is therefore the severance or cutting apart of this metaphorical bond.

it.<sup>2</sup> But this by itself would constitute no more than a breach of the contract or a refusal of performance, while the idea of rescission involves the additional and distinguishing element of a restoration of the status quo, that is, an offer by the moving party to restore all that he has received under it, with a demand for the similar restoration to him of all that he has paid or given under it, and, in effect, a mutual release of further obligations.<sup>3</sup> As to the manner in which rescission is effected, a right to take this action may be reserved to either or both of the parties in the contract itself, and it may then be exercised without other grounds for it than the mere will of the party rescinding, or the occurrence of such conditions as may be stipulated in the contract. Such a reservation may be effected by the use of any suitable language, without the necessity of employing the technical word "rescind."<sup>4</sup> There may also be rescission by the mutual agreement of the parties to the contract, which is in effect the discharge of both parties from the legal obligations admittedly existing thereunder, by a subsequent agreement made before the complete performance of the original contract.<sup>5</sup> Or one of the parties may declare a rescission of the contract, without the consent of the other, or against his protest, if a legally sufficient ground therefor exists, such, for instance, as fraud, false representations, mistake, duress, or infancy. Or, finally, a party believing himself entitled to have the contract abrogated and to have himself restored to his former position may invoke the aid of a court of equity and obtain a decree for the rescission of the contract and, in proper cases, for the cancellation of the instrument evidencing it.

<sup>2</sup> Thus, where the purchaser of goods fails to accept the same, and the seller refuses to take them back, and sues for the price, there is no rescission. The act of refusing to accept an article is not a rescission of the contract, but one of insistence on it. *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983.

<sup>3</sup> *Reiger v. Turley*, 151 Iowa, 491, 131 N. W. 866; *Ballou v. Billings*, 136 Mass. 307; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Jones v. McGinn*, 70 Or. 236, 140 Pac. 994.

<sup>4</sup> *Seanor v. McLaughlin*, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467.

<sup>5</sup> *Holland v. Rhoades*, 56 Or. 206, 106 Pac. 779; *J. K. Armsby Co. v. Grays Harbor Commercial Co.*, 62 Or. 173, 123 Pac. 32.



§ 2. **In Roman and Modern Civil Law.**—The law of Rome recognized a right of rescission of contracts and a method of effecting it which were not essentially different from those accorded by the principles of English equity jurisprudence. The procedure was denominated “*restitutio in integrum*,” that is, “making whole,” or the restoration to the injured party of what he had paid or lost under the contract. The tendency of the Roman law was to regard this restoration as the principal matter and the rescission of the contract as an incident of it, while the English law treats the rescission of the contract as the relief to be afforded in a proper case, and the matter of restoration as a condition or consequence of it. But in the Roman law, as in the English law, the appeal was to equity and it was necessary to show equitable grounds for the interference of the court (such as fraud, duress, mistake, or infancy) and also that the complaining party had acted promptly and was not chargeable with laches, that he had suffered a substantial injury in consequence of an act or omission without his own fault, and that he had no adequate remedy at law.\* These fundamental principles have been carried over into the substantive law of most of the countries of continental Europe, and have also, to a considerable extent, colored the jurisprudence of those of our States whose legal institutions, in their formative period, were affected by the French or the Spanish law. Thus, in California, it is said: “In Spanish law, nullity is divided into absolute and relative. The former is that which arises from a law, whether civil or criminal, the principal motive for which is the public interest; and the latter is that which affects only certain individuals. Nullity is not to be confounded with rescission. Nullity takes place when the act is affected by a radical vice, which prevents it from producing any effect, as, where an act is in contravention of the laws or of good morals, or where it has been executed by a person who cannot be supposed to have any will, as a child under the age of seven years or a madman. Rescission is where an act, valid in appearance, nevertheless conceals a defect which may make

\* Mackeldey, *Modern Roman Law*, §§ 220–233; Dig. 4, 1.

it null if demanded by any of the parties, as, for example, mistake, force, fraud, deceit, want of sufficient age, etc. Nullity relates generally to public order, and cannot therefore be made good either by ratification or prescription, so that the tribunals ought, for this reason alone, to decide that the null act can have no effect, without stopping to inquire whether the parties to it have or have not received any injury. Rescission, on the contrary, may be made good by ratification or by the silence of the parties, and neither of the parties can demand it unless he can prove that he has received some prejudice or sustained some damage by the act.”<sup>7</sup> So, also, with special reference to sales of personal property, in the law of Louisiana, derived in this respect from the Roman law, “redhibition” is the avoidance of a sale on account of some vice or defect in the thing sold, which either renders it absolutely useless or renders its use so inconvenient and imperfect that it must be supposed the buyer would not have taken it if he had known of the defect; and if the thing affected with redhibitory vices has perished, through the badness of its quality, the seller must bear the loss.<sup>8</sup>

**§ 3. To What Classes of Obligations Rescission Applies.** Loosely the term “rescission” has been employed in a wide and generic sense. But it is not properly applicable to the undoing of anything except that which has been the subject of a mutual agreement. The term does not, for instance, properly characterize the repeal of a statute, the setting aside of a judgment or decree, or the revocation of a will. It should be restricted to the cancellation of contracts and grants involving mutual obligations. Again, before there can be any “rescission,” properly so called, there must be a contract completely formed and in force, or at least provisionally binding on the parties. So long as the subject-matter rests in mere negotiation or the tender of an option, either party may be privileged to recede from his propositions and decline to proceed further. But the mere withdrawal of an offer, or, on the other hand, the refusal to

<sup>7</sup> *Sunol v. Hepburn*, 1 Cal. 255, 281.

<sup>8</sup> *Morphy v. Blanchin*, 18 La. Ann. 133; Civ. Code La. art. 2520; Poth. Contr. Sales, 203; Mackeldey, *Modern Roman Law*, § 403.

accept an offered proposition, is not a "rescission" of anything.<sup>9</sup> Nor is there a rescission when a contract is entered into by agents or representatives of one or both parties, upon the condition that the principals, or one of them, shall accept it. In this case, there is no operative contract until such acceptance, and the refusal to accept, or the lapse of the intended contract for failure of acceptance, is the withdrawal from a negotiation, but is not technically a rescission, because there has been no binding obligation created.<sup>10</sup>

**§ 4. Voidability as an Element of the Right of Rescission.**—Rescission is often spoken of as the undoing of a "voidable" contract. But this is not strictly correct. For it must not be forgotten that the parties themselves, by their mutual consent and agreement, may rescind a contract which is not for any reason subject to be avoided by one alone, but on the contrary is perfectly valid and binding. It is therefore more proper to say that a contract is not rescindable at the option of one party, against the wish of the other, or on an application to the court by one party, opposed by the other, unless for some cause it is voidable at the election of the former. On the other hand, where an instrument is void on its face (not merely voidable), it is not in general necessary to resort to any proceeding, legal or equitable, to have it so declared,<sup>11</sup> although, in a suit to quiet title, equity has jurisdiction to cancel an instrument of title at the suit of one in possession under a good title, even though the instrument be void on its face.<sup>12</sup>

<sup>9</sup> *Smithmeyer v. United States*, 147 U. S. 342, 13 Sup. Ct. 321, 37 L. Ed. 196; *Walrath v. Hanover Fire Ins. Co.*, 139 App. Div. 407, 124 N. Y. Supp. 54; *Dietz v. Farish*, 53 How. Prac. (N. Y.) 217; *Borst v. Simpson*, 90 Ala. 373, 7 South. 814; *Scanlon v. Oliver*, 42 Minn. 538, 44 N. W. 1031; *McDonald v. Huff* (Cal.) 18 Pac. 243; *Gordon v. Darnell*, 5 Colo. 302; *Miller v. Moffat*, 153 Ill. App. 1; *Abbott v. Dow*, 133 Wis. 533, 113 N. W. 960. But see *Harper v. City of Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59.

<sup>10</sup> *Hartford Fire Ins. Co. v. Wilson*, 189 U. S. 467, 23 Sup. Ct. 189, 47 L. Ed. 261; *Brown v. American Central Ins. Co.*, 70 Iowa, 390, 30 N. W. 647.

<sup>11</sup> *Ehrlich v. Shuptrine*, 117 Ga. 882, 45 S. E. 279.

<sup>12</sup> *Whitehouse v. Jones*, 60 W. Va. 680, 55 S. E. 730, 12 L. R. A. (N. S.) 49. See *Burt v. Bowles*, 69 Ind. 1.

§ 5. **Rescission and Breach of Contract Distinguished.** One who simply breaches his contract does not thereby rescind it, though his act may give the other party a right to claim rescission and restoration.<sup>13</sup> Yet it is not every breach of a contract which authorizes a rescission, the injured party being generally required to seek damages as a remedy.<sup>14</sup> For facts which will ordinarily warrant the rescission of a contract must have existed at the time the contract was made.<sup>15</sup> Thus, the failure of the seller of a machine to fulfill a promise to put it in good working order will not justify a rescission of the sale and recovery of the purchase price, but merely the recovery of damages.<sup>16</sup> So, a plaintiff is not entitled to rescind his contract with defendant for the purchase of growing agricultural products, merely because the defendant has violated his duty with respect to the care of the crop, where it is not claimed that the contract is tainted by fraud, accident, mistake, duress, or undue influence, or that there has been a total failure of consideration, or that defendant is insolvent, or that any damages awarded against him could not be recovered.<sup>17</sup> But where, in a contract for service, the employer prevents the other party from performing the contract, it is optional with the latter to rescind the agreement, and resort to an action for work and labor performed.<sup>18</sup>

§ 6. **Abandonment or Repudiation of Contract Distinguished.**—Where one of the parties to a contract unjustifiably abandons it or repudiates it, and refuses to proceed with it, this does not constitute a rescission of the contract.<sup>19</sup> Such conduct may and generally will justify the

<sup>13</sup> *City of Nebraska City v. Nebraska City Hydraulic Gaslight & Coke Co.*, 9 Neb. 339, 2 N. W. 870.

<sup>14</sup> *Summers Fiber Co. v. Walker*, 33 Ky. Law Rep. 153, 109 S. W. 883.

<sup>15</sup> *Badger State Lumber Co. v. G. W. Jones Lumber Co.*, 140 Wis. 73, 121 N. W. 933.

<sup>16</sup> *McSwegan v. Gatti-McQuade Co.*, 50 Misc. Rep. 338, 98 N. Y. Supp. 692.

<sup>17</sup> *Summers Fiber Co. v. Walker*, 33 Ky. Law Rep. 153, 109 S. W. 883.

<sup>18</sup> *Connelly v. Devoe*, 37 Conn. 570.

<sup>19</sup> *Schweikert v. Seavey*, 130 Cal. xviii, 62 Pac. 600; *Peabody v. Bement*, 79 Mich. 47, 44 N. W. 416.

other party in declaring a rescission of the contract and in insisting upon a restoration of the status quo and the other usual incidents of a technical rescission.<sup>20</sup> Or such other party may tacitly acquiesce in treating the refusal to continue with the contract as equivalent to a rescission of it. "Where one party assumes to renounce a contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not, of course, amount to a rescission of the contract, because one party to a contract cannot by himself rescind it; but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation."<sup>21</sup> But in respect to the effect upon the rights of the parties, there is a wide difference between a rescission proper and a mere abandonment of the contract. In the former case the one party in effect says to the other: "I hereby rescind our contract, demanding the restoration of whatever I have paid or given under it, and offering to do the like by you." In the latter case, he may be regarded as saying: "I refuse to proceed with the contract. I will restore nothing, and will take my chance of your compelling me, by suit, to make you whole or pay you damages."<sup>22</sup>

<sup>20</sup> *Fletcher v. Cole*, 23 Vt. 114; *Barbee v. Armstead*, 32 N. C. 530, 51 Am. Dec. 404. And see *Wood Mfg. & Realty Co. v. Thompson*, 149 App. Div. 253, 133 N. Y. Supp. 718. Where the holder of an assessment policy of insurance voluntarily ceases payment of assessments and abandons his policy, he cannot thereafter recover damages for its cancellation. *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 51 S. E. 887, 1 L. R. A. (N. S.) 623.

<sup>21</sup> *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, citing *Hochster v. De La Tour*, 2 El. & Bl. 678; *Jonstone v. Milling Co.*, 16 Q. B. Div. 467.

<sup>22</sup> See *Clark v. American Developing & Mining Co.*, 28 Mont. 468, 72 Pac. 978.

Either party to an executory contract can stop further performance by the other party, at any time, by an explicit direction to that effect or by a renunciation of the contract and refusal of further performance on his own part. But thereby he renders himself liable to an action for damages, and to the further contingency that a court of equity might, in some circumstances, decree specific performance against him.<sup>23</sup> And since this is not properly a rescission of the contract, the party abandoning it cannot complain if the other party retains whatever he may have received or acquired under it.<sup>24</sup> But besides the technical rescission of a contract, releasing each party from every obligation under it, as if it had never been made, there is a mode of abandoning a contract, as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment. Such an abandonment, following upon the renunciation of the other party and his refusal to perform, is not a rescission of the contract, but a mere acceptance of the situation which the wrongdoing of the other party has brought about.<sup>25</sup> But merely because a given act or course of conduct by one party is inconsistent with the contract is not sufficient to authorize the other to renounce it, but it must be inconsistent with an intent to be bound by it any longer; and while every breach is inconsistent with the contract, it is not every breach by one party that will authorize the other totally to renounce the contract.<sup>26</sup>

<sup>23</sup> *International Text-Book Co. v. Jones*, 166 Mich. 36, 131 N. W. 98; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423; *Robinson v. Stow*, 39 Ill. 568; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 126 N. W. 293, 136 Am. St. Rep. 710; *Hixson Map Co. v. Nebraska Post Co.*, 5 Neb. (Unof.) 388, 98 N. W. 872.

<sup>24</sup> *Stratton v. California Land & Timber Co.*, 86 Cal. 353, 24 Pac. 1065, citing *Ketchum v. Evertson*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; *Hansbrough v. Peck*, 5 Wall. 506, 18 L. Ed. 520.

<sup>25</sup> *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Goodman v. Haynes Automobile Co.*, 205 Fed. 352, 123 C. C. A. 480; *Hayes v. City of Nashville*, 80 Fed. 641, 26 C. C. A. 59; *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 32 N. E. 773, 30 L. R. A. 33. And see *Elterman v. Hyman*, 192 N. Y. 113, 84 N. E. 937, 127 Am. St. Rep. 862, 15 Ann. Cas. 819.

<sup>26</sup> *McAllister-Coman Co. v. Matthews*, 167 Ala. 361, 52 South. 416, 140 Am. St. Rep. 43.

Thus, the bringing of a suit by the lessee of land against his lessor, in which the plaintiff claims to be the equitable owner of part of the land and seeks specifically to enforce an alleged contract of sale, is a renunciation or abandonment of the lease.<sup>27</sup> But where the purchaser in a contract for the sale of land buys in an incumbrance on the property, has the property sold by the sheriff, and buys it himself, it is held that this does not constitute an abandonment of the contract on his part.<sup>28</sup>

**§ 7. Rescission and Forfeiture Distinguished.**—While a court of equity, in a proper case, will declare a rescission of a contract for a violation of the covenants contained in it, because it would be against conscience to permit one party to violate the contract on his part, and still hold the other party to a compliance with it, yet this is very different from a forfeiture, such as is meant when it is said that a court of equity does not favor forfeitures and will not lend its aid to declare or enforce them.<sup>29</sup> So a provision in a contract for the sale of land, to the effect that it shall be canceled and the earnest money returned if a third person shall decide that the title is defective, is not a provision for forfeiture, such as the statute requires to be declared on notice, but one for rescission.<sup>30</sup>

**§ 8. Rescission by Substitution of New Contract.**—Since it is always in the power of the parties to a contract to rescind or abrogate it by their mutual consent, they may accomplish this result by the substitution of a new contract, implying a mutual discharge from reciprocal obligations under the original contract and the restoration of the status quo or compensation for altered conditions,<sup>31</sup> provided that the new contract shall be complete and binding in itself,<sup>32</sup>

<sup>27</sup> *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812.

<sup>28</sup> *Crouse's Appeal*, 28 Pa. 139.

<sup>29</sup> *Lincoln Trust Co. v. Nathan*, 175 Mo. 32, 74 S. W. 1007.

<sup>30</sup> *Vittengl v. Vittengl*, 156 Iowa, 41, 135 N. W. 63.

<sup>31</sup> *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; *Judson v. Romaine*, 8 Ind. App. 390, 35 N. E. 912; *Caples v. Port Huron Engine & Thresher Co.* (Tex. Civ. App.) 131 S. W. 303.

<sup>32</sup> *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.



and shall embrace each and all of the parties to the original contract.<sup>33</sup> Often the effect of thus making a new contract depends on the intention of the parties with respect to the abrogation of the old contract, and this is a question to be determined by the jury upon the evidence.<sup>34</sup>

Where articles purchased are found unsatisfactory or unsuited to their purpose and are returned to the vendor, and others furnished in their place and accepted, this effects a rescission of the original contract of sale, so that no claims for damages can be founded on it.<sup>35</sup> Such is also the case where an article is returned to the seller and another substituted for it at a higher price,<sup>36</sup> or where the new contract includes additional articles and a change in the price,<sup>37</sup> or even a new contract for the purchase and sale of the same articles, when fully executed, may be a satisfaction of the former agreement as to such sale.<sup>38</sup> There is also a rescission where the new contract changes a conditional sale into an absolute sale,<sup>39</sup> or where a sale of property is changed to a bailment with an option to purchase.<sup>40</sup> And so, where parties to a contract which requires their procedure in a financial enterprise in a particular manner adopt and pursue without the consent of the other contracting parties an entirely different mode of procedure, a rescission is effected as against the parties so departing from the terms of the contract.<sup>41</sup>

The important matter to be noticed in this connection is that if a contract is rescinded by the making of a new agreement, all rights under the original contract are gone, and no claims can be founded upon it, either in respect to compensation for breach of the new contract or for injuries sus-

<sup>33</sup> *Bade v. Hibberd*, 50 Or. 501, 93 Pac. 364.

<sup>34</sup> *Priest v. Wheeler*, 101 Mass. 479; *Hogan v. Peterson*, 8 Wyo. 549, 59 Pac. 162. And see *Gilmer v. Ware*, 19 Ala. 252.

<sup>35</sup> *Holbrook v. Electric Appliance Co.*, 90 Ill. App. 86.

<sup>36</sup> *Fitzsimons v. Richardson*, 86 Vt. 229, 84 Atl. 811.

<sup>37</sup> *Keeney v. Mason*, 49 Barb. (N. Y.) 254.

<sup>38</sup> *Poland Paper Co. v. Foote & Davies Co.*, 118 Ga. 458, 45 S. E. 374.

<sup>39</sup> *Quinn v. Parke & Lacy Machinery Co.*, 9 Wash. 136, 37 Pac. 288.

<sup>40</sup> *In re Naylor Mfg. Co.* (D. C.) 135 Fed. 206.

<sup>41</sup> *Gray v. Bloomington & N. Ry. Co.*, 120 Ill. App. 159.



tained under the old. For example, where a sale of goods, after having been executed on the part of the seller, is canceled by the parties, and a new contract as to the payment is substituted, the seller cannot rescind the sale and claim the goods, by reason of a fraudulent intent on the part of the purchaser not to pay for the goods, existing only at the time of the original contract; and his mere failure to perform the new contract is not sufficient to show that the fraudulent intent continued in respect to the new contract.<sup>43</sup>

**§ 9. Modification or Alteration of Contract Distinguished.**—While, as just stated, a contract may be abrogated or rescinded by the substitution of an entirely new contract, it does not follow that a contract as a whole is done away with by a departure from or a modification or alteration of some of its terms.<sup>43</sup> It is true that a party is not bound to submit to any change in the terms or conditions of his contract, and if this is attempted, with a refusal to perform according to the original terms, it may give him a right of rescission.<sup>44</sup> But if the contract is modified by the mutual consent of the parties, and particularly if one asks and obtains a modification,<sup>45</sup> it does not justify either in treating the contract as rescinded (so as to effect a change in their relative rights or duties) unless the changes are so fundamental and material as really to create a new contract.<sup>46</sup> Thus, a contract is not rescinded by an agreement changing the total price to be paid under it,<sup>47</sup> or the amount of rent to be paid for leased premises,<sup>48</sup> or granting an extension of the time for payment,<sup>49</sup> or changing the mode of payment

<sup>43</sup> *Sparks v. Leavy*, 19 Abb. Prac. (N. Y.) 364.

<sup>43</sup> *Meyer v. Hallock*, 25 N. Y. Super. Ct. 284.

<sup>44</sup> *Schuchardt v. Allen*, 1 Wall. 359, 17 L. Ed. 642; *Beckwith v. Kouns*, 6 B. Mon. (Ky.) 222.

<sup>45</sup> *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963.

<sup>46</sup> *Cooney v. McKinney*, 25 Utah, 329, 71 Pac. 485; *Webb v. Hanley*, 206 Mass. 299, 92 N. E. 429.

<sup>47</sup> *Drucklieb v. Universal Tobacco Co.*, 106 App. Div. 470, 94 N. Y. Supp. 777.

<sup>48</sup> *Haines v. Elfman*, 235 Pa. 341, 84 Atl. 349.

<sup>49</sup> *Smith v. Sackett*, 15 Ill. 528; *Miles v. Hemenway*, 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

as to installments or otherwise.<sup>50</sup> And so also as to a modification in respect to the time for performance.<sup>51</sup> And this is also true of any modifications of the contract with respect to the method of performing the work to be done under it.<sup>52</sup> Thus, if a contract for the construction of a building is altered with the consent of the parties, such alterations do not amount to a rescission of the contract so as to permit the contractor to recover the reasonable value of his work, but the contract price controls, so far as the work is done under the contract.<sup>53</sup> And the re-execution of a contract for the sale of land, merely to correct a mistake in the name of the vendor, does not consummate a new contract.<sup>54</sup>

**§ 10. Effect of Novation.**—If an agreement for novation leaves the subject of the contract unchanged, but introduces a new or substituted party to it, it operates as a rescission of the original contract, so far as to release the retiring party from all further responsibility under it, but not as to enforcement of the original terms against the remaining original party and the new party.<sup>55</sup> If, on the other hand, the novation affects the subject of the contract, but leaves the parties unchanged, it operates to rescind the contract only in case the change is so radical as to give rise to a presumption that the parties intended entirely to abrogate the existing contract and form a new contract.<sup>56</sup>

**§ 11. Rescission and Reformation Distinguished.**—The importance of distinguishing between the reformation of a written contract and its rescission chiefly arises in cases where a mistake is alleged. Reformation is a proper remedy where the parties have reached a definite and explicit

<sup>50</sup> *Greenwood v. Beeler*, 152 Cal. 415, 93 Pac. 98; *Sanders v. Stokes*, 30 Ala. 432; *Zwicky v. Morris*, 146 Ill. App. 69.

<sup>51</sup> *Bangs v. Barret*, 16 R. I. 615, 18 Atl. 250; *General Electric Co. v. National Contracting Co.*, 178 N. Y. 369, 70 N. E. 928.

<sup>52</sup> *Lewman v. United States*, 41 Ct. Cl. 470.

<sup>53</sup> *Garver v. Daubenspeck*, 22 Ind. 238; *Gray v. Jones*, 47 Or. 40, 81 Pac. 813.

<sup>54</sup> *Wellington Realty Co. v. Gilbert*, 24 Colo. App. 118, 131 Pac. 803.

<sup>55</sup> *Douglass v. Roberts*, 1 City Ct. R. (N. Y.) 454; *Bridgeford's Ex'rs v. Miller*, 13 Ky. Law Rep. 927. See *Downs v. Marsh*, 29 Conn. 409; *Morris v. Persing*, 76 Neb. 80, 107 N. W. 218.

<sup>56</sup> *Supra*, §§ 8, 9.

agreement, understood in the same sense by both, but, by their mutual or common mistake, the written contract fails to express this agreement. Rescission is the proper remedy where the contract embodies what the parties nominally agreed on, but, in consequence of one party's ignorance of material facts, known to the other, or his mistake or misapprehension, not shared by the other, there has been no real meeting of their minds, and hence no valid contract. To warrant the reformation of a written instrument, "the mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met, there is no contract, and hence none to be rectified."<sup>57</sup> It follows, therefore, that where one party demands the rescission of a contract on the ground of mistake, the other may insist, if the facts warrant it, that it shall be reformed instead of rescinded. Where the defendant in an action for rescission succeeds in showing that there was an actual and definite agreement, and that the only mistake occurred in reducing it to its final form, and that such mistake was common, then, in the absence of fraud, it will be proper for the court to refuse the prayer for rescission, and instead to order the reformation of the instrument and its enforcement as reformed.<sup>58</sup> And even if the variance between the written contract and the oral agreement of the parties was brought about by fraud on the one side, inducing the mistake on the other, still, if there is no doubt as to what the agreement actually was, it may be a proper case for reformation instead of rescis-

<sup>57</sup> *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Frazier v. State Bank of Decatur*, 101 Ark. 135, 141 S. W. 941. So also, "equity will not reform a written contract unless the mistake is shown to be the mistake of both parties; but it may rescind and cancel upon the ground of mistake of fact, material to the contract, of one party only." *Civ. Code Ga.*, 1910, § 4579.

<sup>58</sup> *Bindsell v. Federal Union Surety Co.*, 130 App. Div. 775, 115 N. Y. Supp. 447; *Davy v. Davy*, 98 App. Div. 630, 90 N. Y. Supp. 242; *Schelling v. Bischoff*, 61 N. Y. Super. Ct. 68, 18 N. Y. Supp. 859; *Matteson v. Johnston*, 139 App. Div. 859, 124 N. Y. Supp. 185; *Van Donge v. Van Donge*, 23 Mich. 321. And see *Fitzkee v. Hoeflin*, 187 Ill. App. 514.

sion.<sup>59</sup> But it must be carefully noted that this does not apply where there was a unilateral mistake as to the subject-matter of the contract. Thus, where a vendor misstates the quantity of land to be conveyed, and the purchaser relies on his statement, and would not have made the bargain if he had known the true quantity, there is no such meeting of the minds of the parties as is necessary to the formation of a true contract, and there can be no reformation of the contract, but it must be rescinded on the application of the purchaser, and this, even though the misstatement was not intentional.<sup>60</sup> Sometimes, also, the circumstances may be such as to give to one of the parties an election either to have the contract reformed or to have it rescinded. Here he must make a definite choice of his remedy. He cannot frame a bill with a double aspect, asking either a cancellation or a reformation of the instrument.<sup>61</sup> And he must abide by an election once made. A contract cannot be rescinded for mistake as to its terms, where the party entitled to rescind has completed the contract and afterwards brought an action to reform it.<sup>62</sup> And so, where the defendant, a party to a contract to convey land, proposed by parol to convey to the plaintiff the property really meant to be conveyed, but which was erroneously described in the contract, and the plaintiff accepted the deed as proposed by the defendant, it was held to be in effect a reformation of the contract, and a complete satisfaction of it as reformed.<sup>63</sup>

**§ 12. Rescission as the Converse of Specific Performance.**—Rescission is often spoken of as the converse of specific performance, meaning that a party who could successfully resist a suit for specific performance will be entitled affirmatively to demand the rescission of the contract.<sup>64</sup>

<sup>59</sup> *Stanek v. Libera*, 73 Minn. 171, 75 N. W. 1124; *Gillis v. Arringdale*, 135 N. C. 295, 47 S. E. 429.

<sup>60</sup> *Tryon v. Lyon*, 133 App. Div. 798, 118 N. Y. Supp. 5. And see *Cullison v. Connor*, 222 Ill. 135, 78 N. E. 14.

<sup>61</sup> *Micou v. Ashurst*, 55 Ala. 607.

<sup>62</sup> *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264.

<sup>63</sup> *Benesh v. Travelers' Ins. Co.*, 14 N. D. 39, 103 N. W. 405.

<sup>64</sup> *McCrea v. Hinkson*, 65 Or. 132, 131 Pac. 1025; *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495, 70 S. W. 390; *Gibson v. Fifer*, 21 Tex. 260.

"In general, where a specific execution would be refused, a rescission will be decreed."<sup>65</sup> But this statement must not be taken too literally. It is not invariably a correct guide. The fact that specific performance of a contract cannot be had is not necessarily conclusive of a right to rescind.<sup>66</sup> Specific performance is much more a matter of grace than rescission. Rescission much more nearly approaches being a matter of right than does specific performance. Hence it is often within the sound discretion of a court of equity to refuse to rescind a contract, although it would also, on the same facts, refuse a decree of specific performance, the result being that the parties are left to their remedies at law.<sup>67</sup> In fact, the rule generally accepted is that, to justify the cancellation or rescission of a contract requires a stronger case than is required to resist a specific performance; in other words, the circumstances which would justify a court of equity in denying a specific performance may not be strong enough to warrant it in sustaining or decreeing a rescission.<sup>68</sup> The matter may be one of evidence. Thus, to warrant a decree rescinding a contract on the ground of fraud, the evidence must be clear and precise, and the court, in the exercise of its discretion, may refuse a rescission, even though, on the same proofs, it would refuse to decree specific performance at the suit of the other party.<sup>69</sup> Or the difference may be found in the facts and circumstances of the case. "There is a wide difference between the facts and circumstances necessary to move a chancellor to refuse the execution of a contract and those necessary to induce him to rescind it. In the one case, interposition will be refused on the ground of improvidence,

<sup>65</sup> Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

<sup>66</sup> Brackenridge v. Dawson, 7 Ind. 383.

<sup>67</sup> Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 721; Jackson v. Ashton, 11 Pet. 229, 9 L. Ed. 698; Beck v. Simmons, 7 Ala. 71; Watkins v. Collins, 11 Ohio, 31; Badger State Lumber Co. v. G. W. Jones Lumber Co., 140 Wis. 73, 121 N. W. 933.

<sup>68</sup> Brainard v. Holsapple, 4 G. Greene (Iowa) 485; Hollis v. Hayes, 1 Md. Ch. 479; Stearns v. Beckham, 31 Grat. (Va.) 379; Husheon v. Kelley, 162 Cal. 656, 124 Pac. 231.

<sup>69</sup> Goggins v. Risley, 13 Pa. Super. Ct. 316.

surprise, or even mere hardship; in the other, a court will act only on the ground of fraud, illegality, or mistake.”<sup>70</sup> It is indeed well settled that a decree of specific performance may be refused where the bargain sought to be enforced is so unjust and unequal as to be unconscionable, although this circumstance is never sufficient, by itself, to warrant a rescission, the latter remedy requiring, in addition, some proof of fraud, deceit, duress, or undue influence.<sup>71</sup> So, specific performance of a contract for the sale of land will not be awarded where it has been obtained by sharp or unscrupulous practices or by overreaching or concealment of important facts, though these circumstances might fall far short of making a case for rescission.<sup>72</sup> Again, a misrepresentation of a material fact may not be enough to warrant a rescission of a contract into which the other party was induced to enter in reliance upon it, if made without any fraudulent intent and with a sincere belief in its correctness, but it will prevent the specific performance of the contract.<sup>73</sup> And so, a promissory representation—relating to some intended future action—if it is not performed, may be ground for refusing specific performance, but not for awarding rescission.<sup>74</sup> And equity will in no circumstances enforce the terms of a contract founded in fraud, although there existed and were accessible to the party defrauded the means and opportunity to

<sup>70</sup> *Lynch's Appeal*, 97 Pa. 349.

<sup>71</sup> *Reynolds v. Craft*, 38 Pa. Super. Ct. 46; *Chanute Brick & Tile Co. v. Gas Belt Fuel Co.*, 82 Kan. 752, 109 Pac. 398; *Barney v. Chamberlain*, 85 Neb. 785, 124 N. W. 482; *Haack v. Scott* (Iowa) 124 N. W. 1068. “Nor is it any reason for rescinding the contract that it has become more burdensome in its operation upon the complainants than was anticipated. If it be indeed unequal now, if it has become unconscionable, it might possibly be a reason why a court should refuse to decree its specific performance, but it has nothing to do with the question whether it should be ordered to be canceled. It is not the province of a court of equity to undo a bargain because it is hard.” *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

<sup>72</sup> *Gibb v. Mintline*, 175 Mich. 626, 141 N. W. 538.

<sup>73</sup> *Glinther v. Townsend*, 114 Md. 122, 78 Atl. 908; *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 969, *Matthey v. Wood*, 12 Bush (Ky.) 293.

<sup>74</sup> *Bowker v. Cunningham*, 78 N. J. Eq. 458, 79 Atl. 608.

detect the fraud by the exercise of ordinary prudence, which will ordinarily be sufficient to defeat his right to rescission.<sup>75</sup> And the inability of the vendor to make a good title at the time the decree is pronounced, though it forms a sufficient ground for refusing specific performance, will not authorize a court of equity to rescind the agreement, at least in a case where the party has an adequate remedy at law for its breach.<sup>76</sup>

On the other hand, "in suits for specific performance, the rule which exacts a correspondence between the allegations and the proof of the terms of the contract is adhered to with great strictness, while in suits for the rescission of contracts on account of fraud, that rule is not applied with the same strictness."<sup>77</sup> And the fact that a contract is not sufficiently definite to decree its specific performance, or to sustain a judgment for damages, is no ground for the refusal of a court of equity to cancel the contract because of the refusal of one of the parties to perform one of its substantial requirements.<sup>78</sup>

**§ 13. Parol Rescission of Written Contract.**—Though a contract (such, for example, as a lease) may be in writing, and even though it may be under seal, it may be surrendered and abrogated by an executed parol agreement of the parties, or by an agreement inferable from their conduct.<sup>79</sup> Further, a party who has been defrauded in making a contract, or deceived by false representations, and who therefore has the right to demand rescission of it, provided he will act promptly and offer to restore the status quo, is not precluded from exercising this right by the mere fact that the contract was reduced to writing and sealed.<sup>80</sup> And it

<sup>75</sup> *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275. And see *Worth v. Watts*, 76 N. J. Eq. 299, 74 Atl. 434.

<sup>76</sup> *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65

<sup>77</sup> *Pierce v. Wilson*, 34 Ala. 596.

<sup>78</sup> *Callanan v. Keesville, A. C. & L. C. R. Co.*, 131 App. Div. 306, 115 N. Y. Supp. 779. And see *Windust v. Sutton*, 54 Wash. 340, 103 Pac. 10.

<sup>79</sup> *Wabash Realty & Loan Co. v. Krabbe*, 145 Ill. App. 462, *Bloomquist v. Johnson*, 107 Ill. App. 154.

<sup>80</sup> *Herrin v. Libbey*, 36 Me. 350; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.)



is no defense to a bill in equity to cancel a written instrument for want of consideration that it is under seal.<sup>81</sup> So, a written contract for the sale of land may be orally rescinded; though mere oral rescission does not divest the party of the estate which he has taken, or bar him from specific performance, without the destruction of the written contract, or surrender of possession if the contract was oral.<sup>82</sup> And a surrender to the vendor of his written contract for the sale of land, to secure the performance by the vendee of a new parol contract of sale, does not, on a failure of the vendee to perform, constitute a cancellation of the written contract.<sup>83</sup> It is further to be remarked that the making of false and fraudulent representations to induce the making of a contract, and which do actually induce it, may be set up as a ground of rescission, or interposed in defense to an action on the contract, although the contract does not include or refer to the representations; and in this case and to this extent, the doctrine that all previous negotiations and representations are merged in the written contract does not apply.<sup>84</sup>

**§ 14. Grounds Required to Support Unilateral Rescission.**—By “unilateral” rescission is meant the undoing of a contract, for good and sufficient cause, on the demand and insistence of one of the parties to it, against the protest or objection of the other. This is not the only way in which a contract may be abrogated. It may be rescinded by the mutual consent of the parties, and in this case it is not necessary that there should be any cause for rescission other than the mere common desire of the parties to do away with the contract and be free from it. Again, a right to rescind at the option of one of the parties may be reserved in the contract, and may then be exercised with-

915; *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468; *Getchell v. Kirby*, 113 Me. 91, 92 Atl. 1007; *Faust v. Rohr*, 167 N. C. 360, 83 S. E. 622.

<sup>81</sup> *Way v. Union Cent. Life Ins. Co.*, 61 S. C. 501, 39 S. E. 742.

<sup>82</sup> *Cunningham v. Cunningham*, 46 W. Va. 1, 32 S. E. 998.

<sup>83</sup> *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610.

<sup>84</sup> *Watson v. Kirby*, 116 Ala. 557, 23 South. 61; *Leicher v. Keeney*, 98 Mo. App. 394, 72 S. W. 145; *Board of Water Com'rs of New London v. Robbins*, 82 Conn. 623, 74 Atl. 938; *Parrish v. Parrish*, 33 Or. 486, 54 Pac. 352.



out reference to any other conditions than those specified in the contract. Again, some kinds of grants are revocable at will, if no special injury will result to the other party, such as licenses, some forms of settlements and trusts, and some contracts of employment, such as those with brokers and other agents. But aside from these instances, it is a general rule that a contract properly entered into by competent parties and founded upon a consideration, and which one of the parties is able and willing to perform, cannot be rescinded by the other, unless he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress.<sup>85</sup> The homely proverb teaches that "it takes two to make a bargain." This is both good sense and good law. And the converse is equally good law,—that "it takes two to undo a bargain once properly made," unless, as we have said, it was induced by fraud or is otherwise open to impeachment in a court of equity. Thus, a deed, a contract, or any other kind of an obligation will not be set aside or rescinded merely because the grantor or contractor has changed his mind about it,<sup>86</sup> or because it was his own inexcusable folly and negligence which led him into it,<sup>87</sup> or because (no concealment or misrepresentations having been practised upon him) he finds it will be very much more difficult and expensive to carry out his contract than he had supposed.<sup>88</sup> And so, although

<sup>85</sup> *Mendell v. Willyoung*, 42 Misc. Rep. 210, 85 N. Y. Supp. 647; *Starling v. State*, 5 Ga. App. 171, 62 S. E. 993; *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877; *Bevins v. J. A. Coates & Sons*, 29 Ky. Law Rep. 978, 96 S. W. 585; *Commercial Register Co. v. Drew*, 168 Ill. App. 347; *Ziehme v. McInerney*, 167 Ill. App. 577; *Harlan v. Logansport Natural Gas Co.*, 133 Ind. 323, 32 N. E. 930; *Tison v. Labeaume*, 14 Mo. 198; *Bellows v. Crane Lumber Co.*, 126 Mich. 476, 85 N. W. 1103; *Wortman v. Montana Cent. Ry. Co.*, 22 Mont. 266, 56 Pac. 316; *Bowman v. Ayers*, 2 Idaho (Hasb.) 465, 21 Pac. 405; *National City Bank v. Wagner*, 216 Fed. 473, 132 C. C. A. 533; *Pardoe v. Jones*, 161 Iowa, 426, 143 N. W. 405; *Listman Mill Co. v. Dufresne*, 111 Me. 104, 88 Atl. 354.

<sup>86</sup> *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356. And see *Clark v. Stetson*, 113 Me. 276, 93 Atl. 741.

<sup>87</sup> *Hardy v. Brier*, 91 Ind. 91; *Moore v. Reed*, 37 N. C. 580.

<sup>88</sup> *Torrey v. Balen Agricultural & Mining Co.*, 2 City Ct. R. (N. Y.) 387.

a mining lease, granted for a money bonus as a consideration, does not bind the lessee to do any mining or to pay money in lieu thereof, the lessor cannot annul or revoke it merely on the ground of a want of mutuality of obligation.<sup>89</sup> And in general, when courts are called upon to set aside contracts, there must be some substantial reasons shown; and a court of equity, particularly, will not act when it is kept in the dark as to the reasons or purposes of a transaction in reference to which relief is sought.<sup>90</sup> To illustrate these principles, where two parties have entered into a written contract for the purchase and sale of goods, neither a countermand of the order for their shipment nor a notice by the purchaser to the seller that he will not accept them will be effectual to cause a rescission of the contract, but to that end the assent of the seller is necessary.<sup>91</sup> So, where one conveyed land to his two sons in consideration of their agreement to support him and to pay a certain sum to a designated charity and a certain other sum to his other children and to mortgage the land as security therefor, it was held that the contract was not revocable at the mere will of the grantor, as a testamentary disposition of the property would have been.<sup>92</sup> And it follows from what has been said above that, when an agreement has been properly executed and delivered, a party executing it cannot afterwards discharge his liability upon it, by simply erasing his signature, without the consent of the other parties.<sup>93</sup> And on the same principle, one of a number of persons accepting a written proposition cannot, by striking out his name without the consent of the others, relieve himself from liability upon such contract or acceptance.<sup>94</sup>

<sup>89</sup> Pyle v. Henderson, 65 W. Va. 39, 63 S. E. 762.

<sup>90</sup> Scanlan v. Gillan, 5 Cal. 182.

<sup>91</sup> Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112; Morgan v. Nashville Grain Co., 12 Ga. App. 574, 77 S. E. 913.

<sup>92</sup> Rutland & B. R. Co. v. Powers' Adm'r, 25 Vt. 15.

<sup>93</sup> Natchez v. Minor, 9 Smedes & M. (Miss.) 544, 48 Am. Dec. 727

<sup>94</sup> Burton v. Shotwell, 13 Bush (Ky.) 271; Merriman v. Norman, 9 Helsk. (Tenn.) 269.

§ 15. **Statutory Grounds for Rescission.**—In several of the states where the body of substantive law has been codified, elaborate and detailed provision is made for the rescission of obligations, the causes therefor being prescribed and carefully defined, and the process and the results to the parties being also regulated by law. To a large extent, these code provisions merely affirm the common law of the subject. But in some important particulars they have advanced beyond the common law, especially in the way of granting a right of rescission for certain causes (for example, promissory representations), as to which the courts have differed so long and so widely that the common law on the subject cannot even now be said to be definitely settled. It is to be observed that, in these states, the provisions of the code are exclusive, so that a party to a contract cannot rescind it except upon the occurrence of some one or more of the causes specified in the code, whatever might have been his rights at common law.<sup>95</sup>

§ 16. **Same; California, Montana, Oklahoma, North Dakota, South Dakota.**—In all these states, the provisions of the codes on the subject of rescission are either identical or very closely similar, the code of California having served as a model for the legislation, on this subject, of the other states named. Dealing first with the principle that a contract is voidable unless founded on the actual, free, and mutual consent of the parties, they provide that “an apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake,” and that “consent is deemed to have been obtained through one of the causes mentioned in the last section only when it would not have been given had such cause not existed.” The principal terms above used are then defined and described as follows: “Duress consists in (1) unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; (2) unlawful detention of the property of any such person; or (3) con-

<sup>95</sup> *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117; *Dowaglac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

finement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive." "Menace consists in a threat (1) of such duress as is specified in subdivisions one and three of the last section; (2) of unlawful and violent injury to the person or property of any such person as is specified in the last section; or (3) of injury to the character of any such person." "Actual fraud consists of any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract: (1) the suggestion as a fact of that which is not true, by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the party making it, of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive." "Constructive fraud consists (1) in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him, or (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." "Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress." "Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract; or (2) belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed. Mistake of law constitutes a mistake within the meaning of this article [jus-

tifying the rescission of a contract] only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. Mistake of foreign laws is a mistake of fact.”<sup>96</sup>

In connection with these provisions, as being in *pari materia* with them, should be read the provision that, for the purposes of a statutory action of deceit, a deceit consists in “(1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the assertion as a fact of that which is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing it.”<sup>97</sup>

Applying these definitions and principles to the rescission of contracts, and dealing first with the right of a party to rescind without invoking the aid of a court, the codes provide that “a party to a contract may rescind the same in the following cases only: (1) if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party; (2) if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part; (3) if such consideration becomes entirely void for any cause; (4) if such consideration, before it is rendered to him, fails in a material respect from

<sup>96</sup> Civ. Code Cal., §§ 1567-1579; Rev. Civ. Code Mont., §§ 4973-4985; Rev. Civ. Code N. Dak., §§ 5288-5300; Rev. Civ. Code S. Dak., §§ 1196-1208; Rev. Laws Okl., 1910, §§ 898-910.

<sup>97</sup> Civ. Code Cal., § 1710; Rev. Civ. Code Mont., § 5073; Rev. Civ. Code N. Dak., § 5388; Rev. Civ. Code S. Dak., § 1293; Rev. Laws Okl., 1910, § 994.

any cause, or (5) by consent of all the other parties. A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation. Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) he must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind, and (2) he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.”<sup>98</sup>

Next, the codes take up the subject of rescission by order or decree of court. They provide that the rescission of a written contract may be adjudged, on application of the party aggrieved, in any of the cases mentioned in that section (quoted above) which enumerates the causes for which a party may rescind on his own initiative, and also “where the contract is unlawful for causes not apparent upon its face, and the parties were not equally in fault, or when the public interest will be prejudiced by permitting it to stand.” Further, “rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made,” and “on adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other party which justice may require.”<sup>99</sup>

It is likewise provided that “a written instrument, in

<sup>98</sup> Civ. Code Cal., §§ 1689-1691; Rev. Civ. Code Mont., §§ 5063-5065; Rev. Civ. Code N. Dak., §§ 5378-5380; Rev. Civ. Code S. Dak., §§ 1283-1285; Rev. Laws Okl., 1910, §§ 984-986.

<sup>99</sup> Civ. Code Cal., §§ 3406-3408; Rev. Civ. Code Mont., §§ 6112-6114; Rev. Civ. Code N. Dak., §§ 6623-6625; Rev. Civ. Code S. Dak., §§ 2353-2355.

respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled," and that "an instrument, the invalidity of which is apparent upon its face or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provision of the last section."<sup>100</sup> We may conclude this review by quoting some miscellaneous provisions touching rescission, which are found in the codes of one or more of the states mentioned. Thus, "on an agreement for sale with warranty, the buyer has a right to inspect the thing sold, at a reasonable time, before accepting it, and may rescind the contract if the seller refuses to permit him to do so. The breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition."<sup>101</sup> "If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price."<sup>102</sup> "The employment by the seller of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his bid, is a fraud upon the buyer which entitles him to rescind his purchase."<sup>103</sup>

All of these codes also contain detailed provisions respecting the rescission of contracts made by minors and by persons of unsound mind. These provisions will be quoted at length in the chapters specifically devoted to those topics. At present, it may be sufficient to state their general tenor, as follows: A minor is not permitted to disaffirm a contract for the reasonable value of things necessary for

<sup>100</sup> Civ. Code Cal., §§ 3412, 3413; Rev. Civ. Code Mont. §§ 6115, 6116; Rev. Civ. Code S. Dak., §§ 2356, 2357. And see Rev. Civ. Code N. Dak., § 6626.

<sup>101</sup> Civ. Code Cal., § 1785; Rev. Civ. Code Mont., § 5121.

<sup>102</sup> Civ. Code Cal., § 1749; Rev. Civ. Code Mont., § 5096; Rev. Civ. Code N. Dak., § 5410; Rev. Civ. Code S. Dak., § 1314.

<sup>103</sup> Civ. Code Cal., § 1797; Rev. Civ. Code Mont., § 5127.



his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them. Neither can he disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute. But except in these two cases, a contract made by a minor may be disaffirmed by the minor himself either before his majority or within a reasonable time afterwards (but in South Dakota and Oklahoma, "before his majority or within one year's time afterwards"), or in case of his death within that period, by his heirs or personal representatives. As to restoration by the minor of what he has received under the contract, it is provided in all the states of this group, except Montana, that such restoration shall be required only in case the minor was over the age of eighteen at the time of making the contract. In Montana, it appears to be required in all cases of disaffirmance of an infant's contracts.<sup>104</sup>

In these states, a person entirely without understanding has no power to make a contract of any kind, but is liable for the reasonable value of things furnished to him which are necessary for the support of himself or his family. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission in the same way and for the same causes as other contracts; but after his incapacity has been so determined, he can make no conveyance or contract, nor delegate any power or waive any right, until his restoration to capacity. In some states, such restoration must have been "judicially determined," but in others, a certificate from the medical officer of any insane asylum to which the patient may have been committed, showing that he has been discharged cured and restored to reason, "shall establish the presumption of the legal capacity of such person from the time of such discharge."<sup>105</sup>

<sup>104</sup> Civ. Code Cal., §§ 35-37; Rev. Civ. Code Idaho, §§ 2603-2605; Rev. Civ. Code N. Dak., §§ 4015-4017; Rev. Civ. Code S. Dak., §§ 17-19; Rev. Laws Okl., 1910, §§ 885-887; Rev. Civ. Code Mont., §§ 3592-3594.

<sup>105</sup> Civ. Code Cal., §§ 38-40; Rev. Civ. Code Mont., §§ 3595-3597;



**§ 17. Same; Georgia.**—The material parts of the Civil Code of Georgia (1910) relating to the rescission of sales and other contracts, are as follows:

“Fraud or duress, by which the consent of a party has been obtained to a contract of sale, voids the sale. Fraud may exist by misrepresentation by either party, made with design to deceive, or which does actually deceive the other party, and in the latter case, such misrepresentation voids the sale, though the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by any artifice designed to mislead. A misrepresentation not acted on is not ground for annulling a contract.” (Secs. 4112, 4113.) “Concealment of material facts may in itself amount to fraud (1) when direct inquiry is made and the truth evaded, (2) when from any reason one party has a right to expect full communication of the facts from the other, (3) where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party and yet keeps silence, (4) where the concealment is of intrinsic qualities of the article which the other party, by the exercise of ordinary prudence and care, could not discover.” (Sec. 4114.) “Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will.” (Sec. 4116.) “Where one who is insolvent purchases goods, and, not intending to pay therefor, conceals his insolvency and intention not to pay, the vendor may disaffirm the contract and recover the goods, if no innocent third person has acquired an interest in them.” (Sec. 4111.)

“Mistake of law, if not brought about by the other party, is no ground for annulling a contract of sale. Mistake of a material fact may in some cases justify a rescission of the contract; mere ignorance of a fact will not.” (Sec. 4115.)

Rev. Civ. Code N. Dak., §§ 4018–4020; Rev. Civ. Code S. Dak., §§ 20–22; Rev. Laws Okl., 1910, §§ 888–890; Rev. Civ. Code Idaho, §§ 2606–2608.

“Mere ignorance of law, on the part of the party himself, where the facts are all known, and there is no misplaced confidence, and no artifice or deception or fraudulent practice is used by the other party either to induce the mistake of law or to prevent its correction, will not authorize the intervention of equity. An honest mistake of law as to the effect of an instrument, on the part of both contracting parties, when such mistake operates as a gross injustice to one and gives an unconscientious advantage to the other, may be relieved in equity. A mistake of law, in the draftsman or other agent, by which the contract as executed does not fulfill or violates the manifest intention of the parties to the agreement, is relievable in equity.” (Secs. 4575–4577.) “In all cases of a mistake of fact material to the contract, or other matter affected by it, if the party complaining applies within a reasonable time, equity will relieve.” (Sec. 4580.) “If the party by reasonable diligence could have had knowledge of the truth, equity will not relieve; nor will the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation nor other fraudulent act.” (Sec. 4581.) “Ignorance by both parties of a fact does not justify the interference of the court; nor will a mistake in judgment or opinion merely, as to the value of the property, authorize such interference.” (Sec. 4582.)

In case of a deficiency in the quantity of the land sold, “the purchaser may demand a rescission of the sale or an apportionment of the price according to relative value. If the purchaser loses part of the land from defect of title, he may claim either a rescission of the entire contract, or a reduction of the price according to the relative value of the land so lost.” (Secs. 4122, 4124.)

“A rescission of the contract by consent, or a release by the other contracting party, is a complete defense. A contract may be rescinded at the instance of the party defrauded; but in order to the rescission, he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received by virtue of the contract, if

it be of any value. In some cases a party may rescind without the consent of the opposite party, for non-performance by him of his covenants; but this can be done only when both parties can be restored to the condition in which they were before the contract was made. Where a contract of sale is rescinded for fraud, the rights of the vendor reclaiming the goods are superior to those of one who has acquired the goods or a lien thereon in consideration of an antecedent debt." (Secs. 4304-4307.)

§ 18. **Same; Alabama.**—In the statutory law of this state it is provided that "misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud," and that "suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circumstances of the case." <sup>106</sup>

§ 19. **Same; Louisiana.**—The Code of this state provides that "engagements made through error, violence, fraud, or menace are not absolutely null, but are voidable by the parties, who have contracted under the influence of such error, fraud, violence, or menace, or by the representatives of such parties. They may be avoided either by exceptions to suits brought on such contracts, or by an action brought for that purpose." <sup>107</sup> The term "error," as used above, is substantially equivalent to "mistake" as used in equity jurisprudence, and the terms "violence" and "menace" are practically equivalent to the common-law terms "duress of imprisonment" and "duress per minas." But the word "fraud" is defined with great particularity in the law of Louisiana, as follows.

"Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or con-

<sup>106</sup> Code Ala. 1907, §§ 4298, 4299.

<sup>107</sup> Rev. Civ. Code La., §§ 1881, 1882.

tinued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. From which definition are drawn the following rules:

1. Error is an essential part of the definition; an artifice that cannot deceive can have no effect in influencing the consent and cannot injure the validity of the contract.

2. The error must be on a material part of the contract, that is to say, such part as may reasonably be presumed to have influenced the party in making it, but it need not be the principal cause of the contract, as it must be in the case of simple error without artifice.

3. A false assertion as to the value of that which is the object of the contract is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he who is induced to contract by means of the assertion might with ordinary attention have detected the falsehood; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other.

4. But a false assertion of the value or cost or quality of the object will constitute such artifice if the object be one that requires particular skill or habit, or any difficult or inconvenient operation, to discover the truth or falsity of the assertion. Sales of articles falsely asserted to be composed of precious metals, sales of merchandise by a false invoice, of any article by a false sample, of goods in packages or bales, which cannot without inconvenience be unpacked or inspected, or where the party making the sale avoids the inspection, with intent to deceive, sales of goods at sea or at a distance, are, with others of like nature, referable to this rule.

5. It must be caused or continued by artifice, by which is meant either an assertion of what is false, or a suppression of what is true, in relation to such part of the contract as is stated in the second rule.

6. The assertion and suppression mentioned in the last preceding rule mean not only an affirmation or negation by words either written or spoken, but any other means cal-

culated to produce a belief of what is false, or an ignorance or disbelief of what is true.

7. The artifice must be designed to obtain either an unjust advantage to the party for whose benefit the artifice is carried on, or a loss or inconvenience to him against whom it is practised, although attended with advantage to no one.

8. It is not necessary that either of the effects mentioned in the last preceding rule should have actually been produced; it is sufficient to constitute the fraud that such would be the effect of the contract if it were actually performed.

9. If the artifice be practised by a party to the contract, or by another with his knowledge or by his procurement, it vitiates the contract; but if the artifice be practised by a third person, without the knowledge of the party who benefits by it, the contract is not vitiated by the fraud, although it may be void on account of error, if that error be of such a nature as to invalidate it; in this case, the party injured may recover his damages against the person practising the fraud.

10. In the words 'loss or inconvenience' which may be suffered by the party is included the preventing him from obtaining any gain or advantage which, without the artifice, he might have obtained.

11. If the advantage to be gained by the party in favor of whom the artifice is practised gives him no unjust advantage, that is to say, no advantage at the expense of the other party, and this latter would neither suffer inconvenience nor loss in consequence of the deception, if the contract were performed, the artifice does not vitiate it.

12. Combinations with respect to sales to enhance the price by false bids, or to depress it by false assertions, are artifices, which invalidate the contract when practised by those who are parties to it, or give rise to an action for damages where they are not.

Fraud, like every other allegation, must be proved by him who alleges it, but it may be proved by simple presumptions or by legal presumptions, as well as by other evidence. The maxim that fraud is not to be presumed means

no more than that it is not to be imputed without legal evidence." <sup>108</sup>

It is also provided in the laws of this state that "if a promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise, to wit: he who has given the earnest, by forfeiting it, and he who has received it, by returning the double." <sup>109</sup>

Rescission of a contract may also be effected under the civil law (in force in Louisiana) by the operation of a "resolatory condition," which corresponds to what the common law knows as one of the kinds of a condition subsequent. It is defined as "that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation. It only obliges the creditor to restore what he has received in case the event provided for in the condition takes place." <sup>110</sup>

Rescission of the contracts of minors is provided for in the law of this state, with much care and detail. "Simple lesion," that is, any loss or inadequacy of consideration, will warrant the rescission of all contracts in favor of a minor not emancipated, or of contracts beyond the capacity of an emancipated minor, provided it does not happen in consequence of a casual and unforeseen event. A minor engaged in trade or being an artisan cannot repudiate engagements entered into in the way of his business or art. Nor can a minor disaffirm engagements stipulated in his marriage contract if sanctioned by those whose consent is necessary to the validity of the marriage, nor obligations

<sup>108</sup> Rev. Civ. Code La., §§ 1847, 1848.

<sup>109</sup> Rev. Civ. Code La., § 2463. And see *Legler v. Braughn*, 123 La. 463, 49 South. 22. An agreement for the sale of real estate, contemplating the passing of property by an act to be executed at a later date, and which in other respects contains the elements essential to a sale, is a "promise of sale," within the meaning of this provision. *Smith v. Hussey*, 119 La. 32, 43 South. 902.

<sup>110</sup> Rev. Civ. Code La., § 2045; *Moss v. Smoker*, 2 La. Ann. 991; *Police Jury v. Reeves*, 6 Mart. (N. S.) 221; *Miquez v. Delcambre*, 125 La. 176, 51 South. 108.

resulting from his offenses or quasi offenses, nor contracts ratified after attaining majority. The fact that the minor, at the time of making the contract, falsely represented himself to be of full age will be no bar to his relief in a proper case. On the disaffirmance of a contract of a minor, he cannot be required to make restoration or reimbursement of what he has received under the contract, "unless it be proved that what was paid accrued to his benefit."<sup>111</sup>

The doctrine of rescission on account of "lesion" is a principle of the civil law adopted and in force in Louisiana, which corresponds in some particulars to the rules of the common law with respect to the annulling of contracts for failure or inadequacy of consideration. But it can be invoked only in the case of the partition, sale, or exchange of real property, and only in behalf of the vendor, not of the purchaser. This subject will be more fully discussed in a later chapter.

<sup>111</sup> Rev. Civ. Code La., §§ 2222-2230, 1872.

## CHAPTER II

### FRAUD AND FRAUDULENT CONCEALMENT

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§ 20. **Fraud as Ground of Rescission in General.**—It is a general rule that a party who has been induced to enter into any contract, obligation, or engagement by means of fraud, deceit, artifice, or trickery practised upon him by the opposite party, and who would not have placed himself in the situation in which he now is, if it had not been for the fraud or deceit, will be entitled to rescind the contract and demand a restoration of the status quo, and may have the aid of a court of equity to accomplish this purpose.<sup>1</sup> This rule is not at all restricted to cases of sales of property. Thus, for instance, equity will set aside a conveyance by which the grantee, by means of fraud, oppression, and undue influence, obtained in settlement of a debt a tract of land of much greater value than the amount of the debt.<sup>2</sup>

<sup>1</sup> *Andrews v. Frierson*, 134 Ala. 626, 33 South. 6; *Green v. Clyde*, 80 Ark. 391, 97 S. W. 437; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356; *Mutual Life Ins. Co. v. Chambliss*, 131 Ga. 60, 61 S. E. 1034; *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S. E. 372; *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699; *Security Trust Co. v. Tarpey*, 66 Ill. App. 589; *Sass v. Thomas*, 6 Ind. T. 60, 89 S. W. 656, 11 L. R. A. (N. S.) 260; *Basye v. Basye*, 152 Ind. 172, 52 N. E. 797; *Stapleton v. Haight*, 135 Iowa, 564, 113 N. W. 351; *Bainter v. Fults*, 15 Kan. 323; *Murray v. Davies*, 77 Kan. 767, 94 Pac. 283; *Rhea v. Yoder*, 2 Ky. (Ky. Dec.) 87; *Campion v. Marston*, 99 Me. 410, 59 Atl. 548; *Towle v. Dunham*, 76 Mich. 251, 42 N. W. 1117; *White v. Mitchell*, 38 Mich. 390; *Bank of Hallowell v. Baker*, 1 Minn. 261 (Gil. 205); *Liddell v. Sims*, 9 Smedes & M. (Miss.) 596; *Lewis v. Starke*, 10 Smedes & M. (Miss.) 120; *Moore v. Mutual Reserve Fund Life Ass'n*, 121 App. Div. 335, 106 N. Y. Supp. 255; *Allen v. Hass*, 27 Ohio Cir. Ct. R. 727; *Lynch v. United States*, 13 Okl. 142, 73 Pac. 1095; *St. Dennis v. Harras*, 55 Or. 379, 105 Pac. 246, 106 Pac. 789; *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 649; *Gilbert v. Hoffman*, 2 Watts (Pa.) 66, 26 Am. Dec. 103; *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520; *Smith v. Montes*, 11 Tex. 24; *Murray Co. v. Putman* (Tex. Civ. App.) 130 S. W. 631; *Gann v. Shaw*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 257; *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337; *Harris v. Harris' Ex'r*, 23 Grat. (Va.) 737; *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721; *Scott v. Perkins*, 4 W. Va. 591; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *W. G. Ward Lumber Co. v. American Lumber & Mfg. Co.*, 247 Pa. 267, 93 Atl. 470.

<sup>2</sup> *Wagg v. Herbert*, 215 U. S. 546, 30 Sup. Ct. 218, 54 L. Ed. 321.

So a corporation may have relief in equity on the ground that its promoters perpetrated a fraud on the corporation and its stockholders by entering into a secret agreement whereby one of them was to obtain a royalty on goods manufactured by the corporation.<sup>3</sup> Again, fraud inhering in part of a collective claim must be held to taint the whole, and the claim, which, standing alone, would be valid, must fall with the fraudulent one with which it is combined.<sup>4</sup> But a party seeking to obtain the rescission of an executed contract on this ground must distinctly allege and clearly prove a distinct case of fraud,<sup>5</sup> so that, for example, in an action on notes given for the purchase price of personal property, if the defendant merely alleges that the property was of no value, but does not allege fraud in inducing him to make the purchase, it is not sufficient to make an issue for the jury on the question of rescission.<sup>6</sup>

But a contract into which one of the parties is induced to enter by the fraud of the other is not absolutely void for that reason. It is voidable at the option of the injured party, but unless that option is exercised, and until it is exercised, the contract is binding and cannot be treated on either side as a mere nullity.<sup>7</sup> Thus, where a vendor deliv-

<sup>3</sup> *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036.

<sup>4</sup> *Welskircher v. Volk*, 29 Pa. Super. Ct. 611.

<sup>5</sup> *Matthey v. Wood*, 12 Bush (Ky.) 293; *Printup v. Fort*, 40 Ga. 276.

<sup>6</sup> *Jesse French Piano & Organ Co. v. Thomas*, 36 Tex. Civ. App. 78, 80 S. W. 1063.

<sup>7</sup> *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Federal Life Ins. Co. v. Griffin*, 173 Ill. App. 5; *Jarrett v. Cauldwell*, 47 Ind. App. 478, 94 N. E. 790; *Richards v. School Tp. of Jackson*, 132 Iowa, 612, 109 N. W. 1093; *El Dorado Jewelry Co. v. Darnell*, 135 Iowa, 555, 113 N. W. 344, 124 Am. St. Rep. 309; *Och v. Missouri, K. & T. Ry. Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; *Smith Bros. v. Mousette*, 75 Misc. Rep. 121, 132 N. Y. Supp. 770; *Ditton v. Purcell*, 21 N. D. 648, 132 N. W. 347, 36 L. R. A. (N. S.) 149; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922; *Richardson v. Vick*, 125 Tenn. 532, 145 S. W. 174. But see *Supreme Council Catholic Knights, etc., v. Beggs*, 110 Ill. App. 139; *J. A. Fay & Egan Co. v. Independent Lumber Co.*, 178 Ala. 166, 59 South. 470; *Jones v. Rhoades*, 167 Iowa, 562, 149 N. W. 637; *Winona Wagon Co. v. Feaster*, 188 Mo. App. 307, 175

ers a deed of real property, which is accepted by the purchaser, or delivers the possession of personal property, with the intention to convey to him, the title passes, even though the sale was brought about by the fraud of the purchaser, but a title so obtained will be voidable at the election of the defrauded vendor, provided the property has not been transferred, before avoidance, to a third person taking title in good faith.<sup>8</sup> Conversely, although a purchaser has accepted a deed and taken possession, he may maintain a bill to rescind the contract if he can show that fraud was practised upon him by the vendor;<sup>9</sup> and a bill to set aside a deed procured by fraud may be maintained, though the complainant is not in possession, and though the land is not vacant and unoccupied.<sup>10</sup> A contract induced by fraud being therefore not void but voidable, the injured party generally has an election between several different remedies. He may choose to rescind the contract and to be made whole by the recovery of whatever he may have paid or given under it, or he may elect to affirm the contract and seek compensation in damages to the extent of the injury which the fraud has caused him,<sup>11</sup> but of course he must take one course or the other, and cannot pursue both.<sup>12</sup> If he elects to rescind, he should tender back whatever he has already received under the contract, and he may then recover whatever he has paid or parted with or its value,<sup>13</sup> and in the case of a defrauded vendor of personal property, he may reclaim the goods themselves, if they have not passed into the hands of a bona fide purchaser.<sup>14</sup> If the transaction in

S. W. 109; *Gross, Kelly & Co. v. Bibb*, 19 N. M. 495, 145 Pac. 480; *Coffman v. Viquesney* (W. Va.) 84 S. E. 1069.

<sup>8</sup> *Berry v. Anderson*, 22 Ind. 36; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Vance v. Walker*, 3 Hen. & M. (Va.) 288.

<sup>9</sup> *Houston v. Hurley*, 2 Del. Ch. 247.

<sup>10</sup> *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146.

<sup>11</sup> *Siltz v. Springer*, 236 Ill. 276, 85 N. E. 748; *Yeomans v. Bell*, 151 N. Y. 230, 45 N. E. 552.

<sup>12</sup> *Yeomans v. Bell*, 151 N. Y. 230, 45 N. E. 552.

<sup>13</sup> *Fields v. Brown*, 160 N. C. 295, 76 S. E. 8; *Union Nat. Bank v. Mailloux*, 27 S. D. 543, 132 N. W. 168; *Davis v. Peabody*, 170 Mass. 397, 49 N. E. 750.

<sup>14</sup> *Hacker v. Munroe*, 176 Ill. 384, 52 N. E. 12; *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

which the fraud was practised, and which it induced, involved the execution of a written instrument, it is also within the jurisdiction and power of a court of equity, on decreeing rescission, to order it surrendered up or canceled, in order that it may not continue in existence as a colorable obligation against the defrauded party. This rule applies to deeds and other conveyances, bonds, notes, and written contracts, whether relating to real or personal property.<sup>15</sup> But it is not necessary for a party thus injured to take the initiative by making a direct attack upon the contract or conveyance in respect to which he has been defrauded. All contracts are open to attack on the ground of fraud, whenever rights are asserted under them.<sup>16</sup> Consequently the party who has been wronged may simply wait until suit is brought against him to enforce the contract or to recover damages for its breach, and then plead the fraud in defense.<sup>17</sup> But in some jurisdictions a distinction is here taken according to the nature of the fraud involved; and it is held that only fraud in the execution of an instrument may be shown in a court of law, as, for instance, where the nature or purport of the instrument is falsely represented to the party executing it; but that where the fraud consists in false representations as to collateral facts, or as to the nature or value of the consideration, it is necessary to resort to a court of equity for relief.<sup>18</sup> But for

<sup>15</sup> *Mershon v. Bank of Commonwealth*, 6 J. J. Marsh. (Ky.) 438; *Robertson v. Owensboro Savings Bank & Trust Co.'s Receiver*, 150 Ky. 50, 149 S. W. 1144; *Barrington v. Ryan*, 88 Mo. App. 85; *Bryson v. Bridges*, 51 Fla. 395, 41 South. 28; *Billups v. Montenegro-Reihms Music Co.*, 69 W. Va. 15, 70 S. E. 779.

<sup>16</sup> *Gibson v. Nelson*, 111 Minn. 183, 126 N. W. 731, 31 L. R. A. (N. S.) 523, 137 Am. St. Rep. 549.

<sup>17</sup> *Becker v. Colonial Life Ins. Co.*, 153 App. Div. 382, 138 N. Y. Supp. 491; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915; *Turner v. Ware*, 2 Ga. App. 57, 58 S. E. 310; *Elgin Jewelry Co. v. Wilson*, 42 Colo. 270, 93 Pac. 1107.

<sup>18</sup> *Miller v. Mutual Reserve Fund Life Ass'n*, 113 Ill. App. 481; *George J. Cooke Co. v. Albert Kaiser & Best Brewing Co.*, 163 Ill. App. 210; *Friedman v. Schwabacher*, 69 Ill. App. 117; *Jackson v. Security Mut. Life Ins. Co.*, 135 Ill. App. 86, affirmed, 233 Ill. 161, 84 N. E. 198; *Gage v. Lewis*, 68 Ill. 604; *Pacific Mut. Life Ins. Co. v. Webb*, 157 Fed. 155, 84 C. C. A. 603, 13 Ann. Cas. 752.

the most part, this distinction is not recognized, but the courts of law are held competent to give relief as against either kind of fraud.<sup>19</sup>

§ 21. **Definitions of Fraud.**—<sup>y</sup>Fraud may be defined as any trick or artifice, whether perpetrated by means of false statements, concealment of material facts, or deceptive conduct, which is intended to (and does) create in the mind of another an erroneous impression concerning the subject-matter of a transaction, whereby the latter is induced to take action, or to forbear from acting, with reference to a property or legal right of his which results to his disadvantage, and which he would not have consented to had the impression in his mind been correct and in accordance with the real facts.<sup>20</sup> Thus, it is said that fraud consists in an undue advantage taken of a party under circumstances which mislead, confuse, or disturb the just results of his judgment, and thus expose him to be the victim of the wilful, the importunate, and the cunning.<sup>21</sup> “A wilful intent to deceive, or such gross negligence as is tantamount thereto, and the actual deceit of the victim, to his damage, are essential elements of actual fraud. The perpetrator must have been guilty of some moral turpitude or of some breach of duty, and the victim must have been deceived and must have acted upon the deceit.”<sup>22</sup> “Fraud is falsehood applied to the purpose of injury, and will not, in the legal sense of the term, exist unless there is, first, an endeavor to deceive, and, next, a false impression produced. Both of these things must concur, and the existence of both must in some appropriate way be established by the complainant.”<sup>23</sup>

<sup>19</sup> *Goodwin v. Fall*, 102 Me. 353, 66 Atl. 727; *Western Mfg. Co. v. Cotton*, 31 Ky. Law Rep. 1130, 104 S. W. 758, 12 L. R. A. (N. S.) 427; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

<sup>20</sup> *In re Nuttall* (D. C.) 201 Fed. 557; *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Ge-win v. Shields*, 167 Ala. 593, 52 South. 887; *Lacoste v. Handy*, Man. Unrep. Cas. (La.) 348; *Great Northern Mfg. Co. v. Brown*, 113 Me. 51, 92 Atl. 993.

<sup>21</sup> *Pursley v. Winkle*, 118 Ind. 139, 19 N. E. 478.

<sup>22</sup> *Daniels v. Benedict*, 97 Fed. 367, 38 C. C. A. 592; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Farmers' & Merchants' Bank v. Farwell*, 58 Fed. 633, 7 C. C. A. 391.

<sup>23</sup> *Vulcan Oil Co. v. Simons*, 6 Phila. (Pa.) 561.

But courts of equity are generally disposed to treat fraud as a breach of trust. That is to say, they define fraud as an act, omission, or concealment which involves a breach of legal or equitable duty, trust, or confidence justly reposed, and which is injurious to another, or by which an undue and unconscientious advantage is taken of another.<sup>24</sup> And undoubtedly the strict rules of law require a person who is dealing at arms' length—dealing with a stranger upon whom he is not in any way dependent, and upon whose candor and fairness he has no special right to rely—to act prudently and warily and be vigilant for the protection of his own interests. To a considerable extent these rules have been relaxed, and replaced by the more sensible doctrine which only weighs the comparative intelligence, shrewdness, and sagacity of the two parties actually before the court. But even now it cannot be said that either law or equity has much compassion for the results of mere blind folly. In such a case, therefore, sharp bargaining, shrewd dealing, or overreaching could not be classed as fraud. For the purpose of the present subject, the rescission of obligations, it may be said that fraud will include any positive act of deception or trickery by which a person is misled to his injury, notwithstanding he has been reasonably careful and prudent, but not the mere negative act of concealing a material fact, which the one person could have discovered for himself, and which the other is not bound, by any trust or confidential relation, to disclose.

But all manner of fraud is abhorrent to the law, and if one person sustains injury through the fraud of another, he will be afforded a proper remedy, whether the injury results from some breach of positive law, or from some violation of a right or duty growing out of the relations existing be-

<sup>24</sup> See *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; *City of Clay Center v. Myers*, 52 Kan. 363, 35 Pac. 25; *Downey v. Atchison, T. & S. F. R. Co.*, 60 Kan. 499, 57 Pac. 101; *Cock v. Van Etten*, 12 Minn. 522 (Gil. 431); *Yuster v. Keefe*, 46 Ind. App. 460, 90 N. E. 920; *Dickinson v. Stevenson*, 142 Iowa, 567, 120 N. W. 324; *Wadsworth v. Board of Sup'rs of Livingston County* (Sup.) 115 N. Y. Supp. 8; *Missouri, K. & T. Ry. Co. v. Maples* (Tex. Civ. App.) 162 S. W. 426; *Horton v. Smith* (Tex. Civ. App.) 145 S. W. 1088.

tween the parties.<sup>25</sup> "Fraud" is said to be a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. The only boundaries defining it are those which limit human knavery.<sup>26</sup> And it should be observed that to defraud another is not only to deprive or withhold from him that which belongs to or is due to him, but also to deprive him of any right, or to induce him to surrender the favorable position in which he has placed himself, by any artifice or wrong practised upon him.<sup>27</sup> And it is not essential that fraud should be accomplished by means of spoken or written falsehoods. If the intended result is accomplished, it is immaterial whether the means employed are affirmative or negative, that is, whether they consist of false pretenses or representations, deceptive acts or conduct, or the fraudulent suppression of material facts.<sup>28</sup> And again, fraud may arise from facts and circumstances of imposition. It may be apparent from the intrinsic value and subject of the bargain itself, being such as no man in his senses would make on the one hand, and as no honest man would accept on the other hand. Or it may be inferred from the circumstances of the parties contracting that it is as much against conscience to take advantage of a man's weakness or necessity

<sup>25</sup> *Williams v. Goldberg*, 58 Misc. Rep. 210, 109 N. Y. Supp. 15.

<sup>26</sup> *Barr v. Baker*, 9 Mo. 850; *Cooper v. Ft. Smith & W. R. Co.*, 23 Okl. 139, 99 Pac. 785.

<sup>27</sup> *Tyner v. United States*, 23 App. D. C. 324; *Ferrell v. Millican* (Tex. Civ. App.) 156 S. W. 230.

<sup>28</sup> *Tyssowski v. F. H. Smith Co.*, 35 App. D. C. 403; *People v. Clark*, 10 Mich. 310; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356. In a case in Iowa, where a vendor, who had by mistake conveyed land to the plaintiff by quitclaim deed, afterwards executed a warranty deed of the same premises to his nephew, which he fraudulently antedated, and thereby induced the plaintiff to reconvey the land to him, it was held that this constituted a deliberate fraud, of which equity could take cognizance. *Mullen v. Callanan*, 167 Iowa, 367, 149 N. W. 516.



as of his ignorance.<sup>29</sup> Further, the applicable principles of law are the same whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by the defendant without aid or co-operation.<sup>30</sup>

The statutory definitions of fraud, contained in the codes of some of the states, do not differ materially from the foregoing definitions drawn from the common law. Thus, in Louisiana, fraud, as applied to contracts, is "the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other."<sup>31</sup> In Georgia, "fraud may exist by misrepresentation by either party, made with design to deceive, or which does actually deceive, the other party; and in the latter case such misrepresentation voids the sale, though the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by any artifice designed to mislead. A misrepresentation not acted on is no ground for annulling a contract."<sup>32</sup> In the codes of several of the western states it is enacted that "actual fraud consists of any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion as a fact of that which is not true, by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the information of the party making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive."<sup>33</sup>

§ 22. **Same; Constructive Fraud.**—Constructive fraud, as distinguished from actual fraud, consists of any act of

<sup>29</sup> *Hinchman v. Emans' Adm'rs*, 1 N. J. Eq. 100.

<sup>30</sup> *Von Au v. Magenheimer*, 196 N. Y. 510, 89 N. E. 1114.

<sup>31</sup> Rev. Civ. Code La., § 1847.

<sup>32</sup> Civ. Code Ga. 1910, § 4113.

<sup>33</sup> Civ. Code Cal., § 1572; Rev. Civ. Code Mont., § 4978; Rev. Civ. Code N. Dak., § 5293; Rev. Civ. Code S. Dak., § 1201; Rev. Laws Okl., 1910, § 903; *Joines v. Combs*, 38 Okl. 380, 132 Pac. 1115.



omission or commission which is contrary to legal or equitable duty, or trust or confidence justly reposed, and which is contrary to good conscience and operates to the injury of another.<sup>34</sup> "By constructive frauds are meant such acts or contracts as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and are therefore prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*."<sup>35</sup> "Constructive fraud consists in any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him, or in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud."<sup>36</sup> The important distinction lies in the fact that actual fraud involves moral turpitude, dishonest purpose, or furtive intent, while, in the case of constructive fraud, the motive is immaterial, and may even have been consistent with an innocent intention.<sup>37</sup> Now it has sometimes been ruled that the right of a party to rescind a contract for fraud exists only where actual fraud is shown, and that a rescission cannot be had for constructive fraud.<sup>38</sup> But this is contrary to the weight of authority; and the

<sup>34</sup> *City of Clay Center v. Myers*, 52 Kan. 363, 35 Pac. 25; Civ. Code Ga. 1895, § 4025.

<sup>35</sup> *Haas v. Sternbach*, 156 Ill. 44, 41 N. E. 51.

<sup>36</sup> Civ. Code Cal., § 1573; Rev. Civ. Code Mont., § 4979; Rev. Civ. Code N. Dak., § 5294; Rev. Civ. Code S. Dak., § 1202; Rev. Laws Okl., 1910, § 904. And see *Curtis v. Armagast*, 158 Iowa, 507, 138 N. W. 873.

<sup>37</sup> *People v. Kelly*, 35 Barb. (N. Y.) 444; *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014; *Forker v. Brown*, 10 Misc. Rep. 161, 30 N. Y. Supp. 827; *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Frost v. Latham* (C. C.) 181 Fed. 866; *Conyers v. Graham*, 81 Ga. 615, 8 S. E. 521; *Blake v. Thwing*, 185 Ill. App. 187; *Alsmeler v. Adams* (Ind. App.) 105 N. E. 1033; *Young v. Barcroft* (Tex. Civ. App.) 168 S. W. 392.

<sup>38</sup> *Barnett v. Speir*, 93 Ga. 762, 21 S. E. 168.

courts have found no difficulty in giving equitable relief against contracts or conveyances where a case of constructive fraud was made out (without showing a dishonest trick or artifice or any evil intent) from the existence of confidential or fiduciary relations between the parties, or from the exertion of duress or undue influence, or from mental weakness being matched against superior shrewdness or cunning, or from the illegality of the subject-matter of the contract, supposing, in the latter case, that the parties were not equally in fault.<sup>39</sup>

§ 23. **Same; Breach of Warranty Distinguished.**—Fraud is distinguished from breach of warranty in this respect, that, in the case of fraud, there is a guilty knowledge of the falsity of the representation on the part of the party making it, while in a breach of warranty there is not this guilty knowledge.<sup>40</sup> “The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests on contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous. If there is a breach of warranty, it cannot be said that the warranty was fraudulent with any more propriety than any other contract can be said to have been fraudulent because there has been a breach of it. On the other hand, to speak of a false representation as a contract of warranty, or as tending to prove a contract of warranty, is a perversion of language and of correct ideas.”<sup>41</sup>

§ 24. **Essential Elements of Actionable Fraud.**—The rule is often stated that five things are essential elements of a fraud or deceit sufficient to warrant an action for deceit or the rescission of a contract, which are (1) a trick, device, or representation, (2) its false or fraudulent character, (3) scienter, that is, knowledge or conscious purpose on

<sup>39</sup> Forster v. Wilshusen, 14 Misc. Rep. 520, 35 N. Y. Supp. 1083; Dorris v. McManus, 3 Cal. App. 576, 86 Pac. 909. And see, *infra*, Chapters 10, 11, and 13.

<sup>40</sup> Marshall v. Gray, 39 How. Prac. (N. Y.) 172.

<sup>41</sup> Rose v. Hurley, 39 Ind. 77. And see Ross v. Reynolds, 112 Me. 223, 91 Atl. 952.

the part of the one practising it, (4) deception, delusion, or misleading of the other party, and (5) resulting injury to such other party.<sup>42</sup> But this enumeration is not quite exhaustive. There must also be an intention to deceive or delude, or an intention that the fraud practised shall influence the action of the other party, and there must be the fact that it did influence him and induce him to enter into the contract or obligation.<sup>43</sup> And further, it is necessary that the fraud, artifice, or representation should have been a material inducement to the contract. "If the fraud be such that, had it not been practised, the contract could not have been made or the transaction completed, then it is material to it; but if it be made probable that the same thing would have been done if the fraud had not been practised, it cannot be deemed material."<sup>44</sup>

First of all it is necessary that there should have been a trick, device, artifice, false pretense, misrepresentation, or fraudulent concealment. Without something of this kind there can be no such "fraud" as will justify rescission.<sup>45</sup>

<sup>42</sup> *Grosjean v. Galloway*, 82 App. Div. 380, 81 N. Y. Supp. 871; *Blumenfeld v. Stine*, 96 App. Div. 160, 89 N. Y. Supp. 85; *Taylor v. Scoville*, 54 Barb. (N. Y.) 34; *Urtz v. New York Cent. & H. R. Co.*, 202 N. Y. 170, 95 N. E. 711; *Mussiller v. Rice* (City Ct.) 116 N. Y. Supp. 1028; *Miller v. John*, 111 Ill. App. 56; *Foster v. Oberreich*, 230 Ill. 525, 82 N. E. 858; *Mizell v. Upchurch*, 46 Fla. 443, 35 South. 9; *Edwards v. Noel*, 88 Mo. App. 434; *Whitehurst v. Life Ins. Co. of Virginia*, 149 N. C. 273, 62 S. E. 1067; *Southern Express Co. v. Fox*, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270, 133 Am. St. Rep. 241; *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485; *Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698.

<sup>43</sup> *Greene v. Mercantile Trust Co.*, 128 App. Div. 914, 112 N. Y. Supp. 1131; *Remmers v. Remmers*, 217 Mo. 541, 117 S. W. 1117; *Milwaukee Worsted Mills v. Winsor*, 157 Wis. 538, 147 N. W. 1068.

<sup>44</sup> *McAleer v. Horsey*, 35 Md. 439; *Cruess v. Fessler*, 39 Cal. 336; *Rev. Civ. Code La.*, § 1847.

<sup>45</sup> *Parker v. Boyd*, 108 Ark. 82, 156 S. W. 440; *Gray v. Koch*, 2 Mich. N. P. 119; *Belden v. Henriques*, 8 Cal. 87; *Coyne v. Avery*, 91 Ill. App. 347; *Wilson v. Wills*, 154 N. C. 105, 69 S. E. 755; *New v. Jackson*, 50 Ind. App. 120, 95 N. E. 328; *Rev. Civ. Code La.*, § 1847. Deceit can be grounded on evasions and acts as well as on direct misrepresentations. *Providence Oil & Gas Co. v. Allen*, 186 Ala. 282, 65 South. 329. Fraud may consist of conduct as well as of words, but must be predicated on material existing facts. *Firebaugh v. Trough*, 57 Ind. App. 421, 107 N. E. 301.

Thus, for example, the fact that an option for the purchase of land is taken for the purpose of speculation does not constitute fraud or unfair dealing on the part of the person taking the option towards a person to whom he sells the land.<sup>46</sup> So, where it cannot be shown that a contract sought to be set aside had its inception in the fraud of the party against whom the relief is sought, but he is merely making an unconscientious use of the statute to keep an advantage obtained through the reliance of the opposite party on his good faith, no relief can be granted.<sup>47</sup> So again, where a corporation desired to obtain a lease of a certain property, but persuaded the owner to make the lease in the name of one of its employes, instead of the corporation itself, representing to him that its business would be injuriously affected if it was publicly known that it had leased the premises, it was held that this did not make out a case of fraud, though the nominal tenant was irresponsible and the corporation disclaimed any liability on the lease.<sup>48</sup>

Again, since, in equity, only what is plainly injurious to good faith is considered as fraud, a party cannot have his contract set aside merely on the ground that he repents of it because he did not use good business judgment in entering into it, or that it is improvident, harsh, or unjust.<sup>49</sup>

Further, the fraud must have been inherent in, or at least contemporary with, the very transaction which is sought to be set aside.<sup>50</sup> Thus, where a merchant sells goods at various times to the same customer, a fraud practised upon him of such a nature as to justify the rescission of a sale of goods made at one time will not be sufficient to authorize a recovery of goods bought at another time, the last transaction being free from fraud.<sup>51</sup> And again, contemplated or intended future fraud is not enough, but there must be fraud executed at the time of making the contract or relating to

<sup>46</sup> *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423.

<sup>47</sup> *Wilson v. Watts*, 9 Md. 356.

<sup>48</sup> *Zinsser v. Ruppel*, 63 Misc. Rep. 575, 118 N. Y. Supp. 627.

<sup>49</sup> *Hirschman v. Hodges*, *O'Hara & Russell Co.*, 59 Fla. 517, 51 South. 550; *Poe v. Ulrey*, 233 Ill. 56, 84 N. E. 46.

<sup>50</sup> *Brown v. Brown*, 64 Mich. 75, 31 N. W. 34.

<sup>51</sup> *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19.

a state of affairs then existing. This distinction is sometimes very delicate, as may be seen in a case in Illinois, where it was ruled that the intention of a party insured to burn the property and collect the insurance is a fraud which will authorize the insurance company to declare an immediate cancellation of the policy, because it is a fraud (the concealment of a fraudulent and criminal purpose) contemporary with the making of the contract; but that, after a loss has occurred, the policy cannot be rescinded on account of such original nefarious purpose, because, if the loss was accidental, the fraud was never executed, and if it was brought about by the assured's own act, then the fraud consisted, not in the original design, but in the execution of it, and in this aspect was not contemporary with the contract.<sup>52</sup>

Again, when it is said that the fraud must inhere in the contract or relate to its execution, it is implied (and such is the law) that fraud is not made out by merely showing that the other party has violated the agreement or failed to fulfill his engagements.<sup>53</sup> This is illustrated by a case in New Jersey, where it appeared that the complainant, having given considerable study to the situation with reference to a certain industry, conceived and formulated a plan for combining in one company the various plants engaged in it. With this view, he obtained options for the purchase of some of the plants and opened negotiations for the others. As the whole plan would require several millions of dollars, and was therefore beyond his own financial ability, he sought the aid of the defendant, a capitalist, proposing on his own part to contribute a certain amount, if defendant would join in the plan and contribute enough to insure its

<sup>52</sup> *Imperial Fire Ins. Co. v. Gunning*, 81 Ill. 236. But see *Smith v. Lightner* (Tex. Civ. App.) 26 S. W. 779, holding that if one who agrees to run a horse race acts so as to induce the belief that he intends to practise fraud in the race, the other party may declare the race off and recover the forfeit.

<sup>53</sup> *Caldwell v. Duncan*, 87 S. C. 331, 69 S. E. 660; *Wilson v. Irish*, 62 Iowa, 260, 17 N. W. 511; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519. And see *Maine Northwestern Development Co. v. Northern Commercial Co.* (D. C.) 213 Fed. 103; *Turner v. Bray*, 72 Or. 334, 143 Pac. 1011.

success. Defendant expressed himself as willing to join in the enterprise, provided an examination of the plan and papers by his attorneys and experts should confirm what the complainant had told him, and as a matter of fact the examination did confirm such statements. But the defendant availed himself of the information which he had thus obtained and proceeded, on his own account entirely, to organize a company and by means of it to gain control of the plants in question, whereby he made large profits, but shutting out the complainant entirely. It was held that there might be a remedy by an action at law for the wrongful appropriation of the plan, but that equity could give no relief, because there had been no contract entered into, but merely a negotiation for the making of a definite agreement.<sup>54</sup>

But if there really is fraud, the right to rescind a contract on this ground depends on the existence of the fraud, and not on the party's knowledge of it when he exercises the right. "Although complainant acted on suspicion only, he was justified in rescinding, provided his suspicions of fraud were subsequently verified. The right of rescission depends on the existence of the fraud, and not on the accuracy or conclusiveness of the party's knowledge of it when he exercises the right."<sup>55</sup> And finally, to sustain an action for deceit, it is not necessary that the person guilty of the fraud should have derived any advantage from it.<sup>56</sup>

**§ 25. Forged Instruments or Signatures.**—A person who is tricked into parting with his money, or with any other valuable consideration, by means of a forged document, such as a deed, note, or bond, may rescind the transaction and recover back what he has paid or given, provided he acts with due promptness upon discovering the cheat, and his action is maintainable on either of the three grounds of fraud, mistake, or want of consideration.<sup>57</sup> The

<sup>54</sup> *Haskins v. Ryan*, 75 N. J. Eq. 330, 78 Atl. 566; *Id.*, 75 N. J. Eq. 623, 73 Atl. 1118. But compare *Mundy v. Foster*, 31 Mich. 313.

<sup>55</sup> *Cunningham v. Pettigrew*, 169 Fed. 335, 94 C. C. A. 457, citing *Peterson v. Chicago, M. & St. P. R. Co.*, 38 Minn. 511, 39 N. W. 485.

<sup>56</sup> *Williams v. Goldberg*, 58 Misc. Rep. 210, 109 N. Y. Supp. 15.

<sup>57</sup> *Westrop v. Solomon*, 8 C. B. 345; *Jones v. Ryder*, 5 Taunt. 488;

rule is the same where it is the person's own signature that is forged. That is to say, one who pays a note or other obligation purporting to bear his own signature, in the belief that it is genuine, though the signature is really a forgery, may recover back what he has paid, provided he acts without unnecessary delay and provided no rights of third persons have intervened.<sup>58</sup> On similar principles, one who accepts counterfeit money in payment of a debt, or as the price of property sold, supposing it to be good, may rescind and recover, but only in case he acts promptly on discovering the fraud.<sup>59</sup> Furthermore, a person whose name is forged to a deed, a note, or other written instrument, may maintain a bill in equity to have it surrendered and canceled, or for a decree pronouncing the instrument null and void and releasing him from all liability thereon.<sup>60</sup> And a similar action is maintainable, at least in respect to a forged deed, under those provisions of the codes which declare that a written instrument in respect to which there is a reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may be so adjudged on his application and ordered to be delivered up or canceled.<sup>61</sup> And the fact that the purported maker of a forged instrument could defend against it at law, if the holder should sue on it, is not regarded as such an "adequate remedy" as would oust the jurisdiction of a court of equity.<sup>62</sup> Nor is the case of relief against a forged

*Gurney v. Womersley*, 4 El. & Bl. 133; *Furgerson v. Staples*, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; *Allen v. Sharpe*, 37 Ind. 73, 10 Am. Rep. 80; *Carpenter v. Northborough Nat. Bank*, 123 Mass. 69; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203; *Eagle Bank v. Smith*, 5 Conn. 71, 13 Am. Dec. 37; *Emerine v. O'Brien*, 36 Ohio St. 491; *Goodrich v. Tracy*, 43 Vt. 314, 5 Am. Rep. 281. See *Costelo v. Barnard*, 190 Mass. 260, 76 N. E. 599, 3 L. R. A. (N. S.) 212, 112 Am. St. Rep. 328; *Commercial Nat. Bank v. First Nat. Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879.

<sup>58</sup> *Welch v. Goodwin*, 123 Mass. 77, 25 Am. Rep. 24; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *Ross v. Terry*, 63 N. Y. 613.

<sup>59</sup> *McDonald v. Allen*, 8 Baxt. (Tenn.) 446; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *Wingate v. Neidlinger*, 50 Ind. 520.

<sup>60</sup> *Huston v. Roosa*, 43 Ind. 517; *Huston v. Schindler*, 46 Ind. 38; *Hardy v. Brier*, 91 Ind. 91.

<sup>61</sup> *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091.

<sup>62</sup> *Hardy v. Brier*, 91 Ind. 91. So, a federal court of equity has ju-



deed taken out of the jurisdiction of equity by the fact that the deed is absolutely void, nor is it necessary, before bringing such a suit, that the legal owner should establish his title and obtain possession of the land by ejectment or other proceeding at law.<sup>63</sup> And it is no obstacle to the maintenance of such a proceeding that the defendant cannot be compelled to make any answer which would tend to criminate himself.<sup>64</sup> And it cannot be properly pleaded as a defense to an action to cancel a deed and its record as a forgery, that the plaintiff held title to the land in trust for the defendant, in that the defendant paid the purchase money and took title in plaintiff's name as a matter of convenience.<sup>65</sup>

It is further to be observed that, within the meaning of these rules, an instrument may be a forgery, though the signature to it is genuine. This doctrine was applied in a case in Michigan where the owner of property, upon executing a lease of it, which he had read and which correctly expressed his intentions, was tricked into signing another paper, which was represented to him as a duplicate of the lease, but which was in reality a deed of conveyance of the land, the date of which had been altered so as to make it appear to have been given several weeks later than the actual date of execution.<sup>66</sup>

The rules stated in this section are applied not only to the case of fraud perpetrated by the forgery of deeds and other conveyances,<sup>67</sup> but to the case of patents to land issued by

jurisdiction of a suit for the cancellation of a forged note, brought by the purported maker against the payee, who is alleged to be asserting the validity of the note and attempting to negotiate the same, where, under the state statute, an action to recover on the note would not be barred for more than eleven years, as the complainant's remedy at law in such a case, by defending against the note when sued on it, would not be as practical and efficient as that in equity, and therefore not adequate and complete. *Schmidt v. West* (C. C.) 104 Fed. 272.

<sup>63</sup> *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133; *Hoopes v. Devaughn*, 43 W. Va. 447, 27 S. E. 251.

<sup>64</sup> *Singery v. Attorney General*, 2 Har. & J. (Md.) 487.

<sup>65</sup> *Mitchell v. Mitchell*, 41 Colo. 72, 91 Pac. 1103.

<sup>66</sup> *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848.

<sup>67</sup> *James v. City Investing Co.* (C. C.) 188 Fed. 513; *Cutler v. Fitz-*



the General Land Office to fictitious grantees on forged and fraudulent homestead applications and proofs,<sup>68</sup> to forged mortgages or deeds of trust,<sup>69</sup> or assignments of such securities,<sup>70</sup> and to spurious promissory notes,<sup>71</sup> and bail or replevin bonds.<sup>72</sup>

The effect of a rescission for forgery is to annul the entire transaction and to establish the invalidity of the false instrument. Thus, in a case in New York, a certified check was given to one of two partners for the sale and assignment of certain accounts due to the firm, but after payment of the check, the other partner asserted that the firm's indorsement was a forgery, whereupon the amount paid thereon was refunded and the check returned to the partner who originally held it, and the accounts referred to were collected by the firm. It was held that this constituted a rescission of the contract of sale, so that the partner holding the check, or his transferee with notice, could not collect it from the bank on which it was drawn.<sup>73</sup>

The usual rule applicable to one seeking to rescind a contract and recover what he has paid or parted with is that he must also restore what he has received, except in cases where the thing received is absolutely worthless. This applies in the case of a forgery. In the case of negotiable paper, for instance, if any of the parties to it are legally liable, though some of the purported signatures or indorsements are forgeries, the holder must surrender it up, as a condition to his own recovery; but he will not be required to do so if the only signature is a forgery, or if the indorsement is forged and the maker is insolvent, especially if possession

gibbons, 148 Cal. 562, 83 Pac. 1075; *Stafford v. Stafford*, 1 N. J. Eq. 525. See *Green v. Brown* (Miss.) 34 South. 147. And compare *Boardman v. Jackson*, 119 Mass. 161, as to the adequacy of the remedy at law.

<sup>68</sup> *United States v. McLeod* (C. C.) 174 Fed. 508.

<sup>69</sup> *Ehrler v. Braun*, 22 Ill. App. 391, affirmed 120 Ill. 503, 12 N. E. 906; *Helm v. Lynchburg Trust & Sav. Bank*, 106 Va. 603, 56 S. E. 598.

<sup>70</sup> *Nahe v. Bauer*, 141 App. Div. 115, 125 N. Y. Supp. 592.

<sup>71</sup> *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272.

<sup>72</sup> *Patterson v. Smith*, 4 Dana (Ky.) 153.

<sup>73</sup> *Silverman v. National Butchers' & Drovers' Bank*, 50 Misc. Rep. 169, 98 N. Y. Supp. 209.

of the paper may be necessary to enable him to make out his case against a third person.<sup>74</sup>

§ 26. **Fraudulent Alteration of Instruments and Additions Thereto.**—The alteration of a written instrument after its execution and delivery, whether by erasure or addition or both, when done without authority and for the purpose of gaining some benefit or advantage surreptitiously, or placing the maker or grantor in a less advantageous position and one which he never agreed to assume, is a form of fraud which will justify the rescission of the transaction and the maintenance of a proceeding in equity for the surrender and cancellation of the instrument.<sup>75</sup> This rule has been applied in a case where the signature of the grantor to a blank deed was procured by false representations, and the deed was subsequently filled out by the grantee with a description of lands not sold,<sup>76</sup> and in a case where a deed of trust was fraudulently altered after its delivery by incorporating in it additional property not intended to be mortgaged,<sup>77</sup> and in a case where property was conveyed to a certain person in trust, and he was described in the deed as trustee, and he afterwards erased the word "trustee," and borrowed money on the property and conveyed away the reversion to a third person.<sup>78</sup> So, in another case, a grantor executed a deed purporting to be in consideration of the payment of a certain sum in cash. The grantee obtained possession of the deed on a pretext, and at the same time executed and delivered a writing to the grantor, reciting the purchase and the execution of the deed, and agreeing that if the consideration was not paid in three days the deed should

<sup>74</sup> *Cornellius v. Lincoln Nat. Bank*, 15 Pa. Super. Ct. 82; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203; *Smith v. McNair*, 19 Kan. 330, 27 Am. Rep. 117.

<sup>75</sup> *Gregory v. Howell*, 118 Iowa, 26, 91 N. W. 778; *Putnam v. Clark*, 33 N. J. Eq. 338; *Hampton v. Mayes*, 3 Ind. T. 65, 53 S. W. 483; *Kennedy v. Kennedy*, 194 Ill. 346, 62 N. E. 797. Compare *Wilson v. Miller*, 143 Ala. 264, 39 South. 178, 111 Am. St. Rep. 42, 5 Ann. Cas. 724.

<sup>76</sup> *Vica Valley & C. R. Co. v. Mansfield*, 84 Cal. 560, 24 Pac. 145.

<sup>77</sup> *Merchants' & Farmers' Bank v. Dent*, 102 Miss. 455, 59 South. 805.

<sup>78</sup> *Filtcraft v. Commonwealth Title Ins. & Trust Co.*, 211 Pa. 114, 60 Atl. 557.

be void, but otherwise to be in full effect. The grantee also got this writing into his possession and, without authority, altered it so that it read "fifteen" days instead of "three" days, and on the same day the deed was executed he conveyed the land to a third person. Both deeds were placed on record, but no part of the purchase money was ever paid to the grantor. It was held that both deeds were fraudulent as against him.<sup>79</sup>

On the same principle, where a deed is completed except for the name of the grantee, which is left blank, and is executed by the grantor, and in that condition is placed in escrow or placed in the hands of an agent, and the blank is filled in, without authority, with the name of a grantee to whom the owner did not intend to convey, or whom he is not willing to accept as a purchaser, it is a fraudulent alteration which will support an action for the cancellation of the deed.<sup>80</sup>

**§ 27. Fraud in Obtaining Possession of Deed.**—Where the grantee in a deed obtains possession of it by any furtive or surreptitious means, when it was not intended to be delivered to him, or not to be delivered except upon the performance of conditions with which he has not complied, it is a fraud cognizable in equity, and the instrument may be ordered surrendered up or canceled.<sup>81</sup> This is the case, for example, where the grantee secretly or fraudulently abstracts the deed from the place where the grantor has put it for safe-keeping,<sup>82</sup> or without his permission takes it up from the table where it is lying and carries it off.<sup>83</sup> So where the grantor, wishing to retain the ownership and

<sup>79</sup> *O'Connor v. O'Connor*, 45 W. Va. 354, 32 S. E. 276.

<sup>80</sup> *Maclellan v. Selm*, 57 Kan. 471, 46 Pac. 959; *Mitchell v. Squire*, 128 Iowa, 269, 103 N. W. 783; *Whitaker v. Miller*, 83 Ill. 381; *Prindiville v. Curran*, 132 Ill. App. 162; *Wiggenhorn v. Daniels*, 149 Mo. 160, 50 S. W. 807.

<sup>81</sup> *Gragg v. Maynard*, 164 Mich. 535, 129 N. W. 723; *Cowart v. Aycock*, 139 Ga. 432, 77 S. E. 382; *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936; *Ashley v. Denton*, 1 Litt. (Ky.) 86.

<sup>82</sup> *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *Garner v. Risinger*, 35 Tex. Civ. App. 378, 81 S. W. 343; *Arnold's Heirs v. Arnold*, 26 Ky. Law Rep. 884, 82 S. W. 606.

<sup>83</sup> *Pierson v. Fisher*, 48 Or. 223, 85 Pac. 621.

enjoyment of property during his own life, makes and executes a deed of it and places the same in the hands of a third person, with instructions not to deliver it to the grantee until after the grantor's death, or delivers it to the grantee himself with directions not to open the package containing it until after the grantor's death, and in either case his directions are disobeyed and the deed placed on record, the grantor may maintain an action to have the deed declared void.<sup>84</sup> For the same reason equity will decree the cancellation of a deed which was placed in escrow and which was either fraudulently abstracted from the depository by the grantee or fraudulently turned over to him without compliance with the conditions or the consent of the grantor.<sup>85</sup> And the rule is the same where a deed or an agreement to sell is placed in the hands of the owner's agent, with instructions not to deliver it to the purchaser save on the performance of certain conditions, and the agent disobeys his instructions and delivers the deed without performance.<sup>86</sup>

**§ 28. Substitution of One Instrument for Another.**—It is ground for the rescission or cancellation of an obligation, or of defense to an action upon it, that it is not the instrument which the party intended to execute and supposed he was executing, but an instrument of a different kind which was fraudulently or surreptitiously substituted for the one agreed on, a trick, device, or misrepresentation having been practised to secure his signature.<sup>87</sup> This rule may be invoked, for example, where a person who meant to execute a mortgage and supposed that such was the character of the instrument which he signed, discovers that a deed had been

<sup>84</sup> *Thompson v. Owens*, 121 Mich. 138, 79 N. W. 1092; *Gatt v. Shive* (Tex. Civ. App.) 82 S. W. 303.

<sup>85</sup> *Jackson v. Lynn*, 94 Iowa, 151, 62 N. W. 704, 58 Am. St. Rep. 386; *Hogueland v. Arts*, 113 Iowa, 634, 85 N. W. 818; *Ruble Combination Gold Min. Co. v. Princess Alice Gold Min. Co.*, 31 Colo. 158, 71 Pac. 1121; *Conklin v. Benson*, 159 Cal. 785, 116 Pac. 34, 36 L. R. A. (N. S.) 537.

<sup>86</sup> *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Wiard v. Brown*, 59 Cal. 194.

<sup>87</sup> *Papke v. G. H. Hammond Co.*, 192 Ill. 631, 61 N. E. 910; *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198; *Hendrix v. People*, 9 Ill. App. 42; *Johnson v. Carter*, 143 Iowa, 95, 120 N. W. 320.

substituted for it,<sup>88</sup> or where one meaning to sign a will is similarly tricked into executing a deed,<sup>89</sup> or where a deed in fee is substituted for an option to purchase,<sup>90</sup> or for what was intended merely to be a lease of the property,<sup>91</sup> or where the paper which one signed under the belief that it was merely a receipt for money turns out to have been a promissory note,<sup>92</sup> or where an applicant for a policy of life insurance of a certain kind receives a policy of an entirely different kind, and finds that he was misled or tricked into signing the wrong application.<sup>93</sup>

But it is a sound general rule of law that a person of average intelligence, in the full possession of his senses, must exercise a reasonable measure of care and prudence to avoid being victimized. Unless seduced into a false sense of security, he must be on his guard against fraud and treachery, and cannot be heard to complain of a fraudulent substitution which he had sufficient intelligence and knowledge of the subject to detect, where he was not prevented from investigating the matter for himself by any trick or persuasion of the other party. It is not sufficient, therefore, merely to show that the instrument which actually was signed is different from what the party supposed he was signing. Relief may sometimes be given in such a case on the ground of mistake. But that is altogether a different matter from fraud, and governed by a different set of rules. If fraud is the defense relied on, the party must show something more than the mere substitution of one instrument for another. He must show that the substitution was fraudulent. He must overcome the ordinary presumption that a person who is able to read has acquainted himself with the contents of any business document before attach-

<sup>88</sup> *Gumpel v. Castagnetto*, 97 Cal. 15, 31 Pac. 898.

<sup>89</sup> *Fellbush v. Fellbush*, 216 Pa. 141, 65 Atl. 28; *Carter v. Walden*, 136 Ga. 700, 71 S. E. 1047.

<sup>90</sup> *Gillis v. Arringdale*, 135 N. C. 295, 47 S. E. 429.

<sup>91</sup> *Tufts v. Tufts*, 123 U. S. 76, 8 Sup. Ct. 54, 31 L. Ed. 91.

<sup>92</sup> *Ribner v. Kleinberg* (Sup.) 122 N. Y. Supp. 239.

<sup>93</sup> *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *Lierhelmer v. Minnesota Mut. Life Ins. Co.*, 122 Mo. App. 374, 99 S. W. 525; *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.) 99 S. W. 580.

ing his signature.<sup>94</sup> Hence, in the case supposed, he must show such facts as that he was unable to read, that the paper was misread to him, that its contents were concealed from him, that he was prevented or dissuaded from reading it, that it was of such a technical nature that a perusal of it would not have enlightened him, or that he justifiably relied on the representations of the other party as to the nature of the instrument.<sup>95</sup> As to the last point, there is authority for the proposition that a mere false representation as to the character of the instrument is enough to make out a case of fraud, irrespective of the question whether or not the party could read, as, where it is falsely stated to him that the paper which he is asked to sign is a note instead of a mortgage, or a deed instead of a lease, or a mere receipt for money instead of a release of damages.<sup>96</sup> And even if this rule is too broad, as excluding entirely the question of the party's own negligence, there are certainly numerous cases in which he will be justified in relying on any statements made to him by the opposite party, and therefore will be entitled to relief if misled by false and fraudulent misrepresentations. Such a case exists, for instance, where one of the parties occupies a position of trust or confidence towards the other, or where their intimate relationship (as in the case of parent and child) justifies the most implicit confidence.<sup>97</sup> So, an applicant for life insurance is warranted in relying on what the company's agent tells him in regard to the application and the terms of the policy to be issued.<sup>98</sup> And in general, if the defrauded party can show, in addition to a false representation, any trick or artifice resorted to in order to prevent him from discovering the cheat, his case for equitable relief will be complete. This is true, for instance, where the other party took advantage of his igno-

<sup>94</sup> See, *infra*, § 52.

<sup>95</sup> *Hardy v. Brier*, 91 Ind. 91; *History Co. v. Dougherty*, 3 Ariz. 387, 29 Pac. 649.

<sup>96</sup> *Tillis v. Austin*, 117 Ala. 262, 22 South. 975; *Gillespie v. Hester*, 160 Ala. 444, 49 South. 580. And see, *infra*, §§ 56, 57.

<sup>97</sup> *Tufts v. Tufts*, 123 U. S. 76, 8 Sup. Ct. 54, 31 L. Ed. 91.

<sup>98</sup> *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.) 99 S. W. 580; *Green v. Security Mut. Life Ins. Co.*, 159 Mo. App. 277, 140 S. W. 325.

rance to deceive and impose upon him, or took measures to prevent him from ascertaining the real character of what he was signing,<sup>99</sup> or where a person unfamiliar with business and unable to read English is induced to sign a confession of judgment by the false assurance and pretense that it is a chattel mortgage,<sup>100</sup> or where one who is entirely unaware of the formal requisites of deeds and of wills is falsely induced to sign a deed, supposing it to be a will.<sup>101</sup> For similar reasons, relief may be given in a case where it is shown that, in consequence of the highly technical nature of the subject and of the phraseology employed, the person would not have discovered, from even an attentive reading of the paper presented to him, that it was a substitute for what he supposed he was signing.<sup>102</sup> So a policy of life insurance may be canceled at the instance of the insured where he shows that he was led into signing an application for a different kind of policy than that which he contracted for by the false representation of the company's agent, and that the agent hurried him into signing without due consideration, and that he was deceived by a misleading indorsement on the policy shown him and by certain prominent headlines in it.<sup>103</sup> Again, one cannot be charged with such negligence or inattention as should preclude him from relief unless he was in the full possession of his faculties at the time. To trick a drunken man into signing a contract materially different from the one to which he had verbally agreed when sober is fraud justifying rescission of the contract.<sup>104</sup> But in an action on a written contract, an answer allëging an antecedent oral agreement, and that the written contract was substituted therefor after objection, and upon threat of a breach of the oral contract by the plaintiff, and in reliance on a statement by the plaintiff that other parties who had previously signed were satisfied with

<sup>99</sup> *Clements v. Life Ins. Co. of Virginia*, 155 N. C. 57, 70 S. E. 1076.

<sup>100</sup> *Fleseler v. Stege*, 86 Hun, 595, 33 N. Y. Supp. 749.

<sup>101</sup> *Carter v. Walden*, 136 Ga. 700, 71 S. E. 1047.

<sup>102</sup> *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.) 99 S. W. 580.

<sup>103</sup> *Glassner v. Johnston*, 133 Wis. 485, 113 N. W. 977.

<sup>104</sup> *Merchants' Nat. Bank v. Brisch*, 154 Mo. App. 631, 136 S. W. 28.



the written contract, does not allege such fraud as to avoid the contract.<sup>106</sup>

**§ 29. Fraudulent Substitution as to Subject of Purchase.** If a grantor of land, in fulfilling an agreement to convey a certain parcel of land for a stipulated price, is induced by fraud or misrepresentation, upon receipt of that price, to execute a deed conveying another parcel also, he may rescind and recover as to the parcel fraudulently included, but not as to the parcel intended to be granted, except upon payment or tender of the money received.<sup>106</sup> Conversely, it is the right of a purchaser to rescind on discovering that the deed given to him describes and conveys a parcel of land different from that which was pointed out to him and which he agreed to buy.<sup>107</sup> And of course these principles apply equally to the purchase and sale of chattels as to dealings in real estate.<sup>108</sup> Thus, where one bargains for the purchase of a bicycle of a certain well-known and high-grade make, and the seller is perfectly aware of what is in the buyer's mind, but fraudulently delivers to him a spurious wheel of a different manufacture and of inferior grade, the buyer may rescind, at least if he had no reasonable opportunity to discover the cheat until after accepting the bicycle.<sup>109</sup> The same rule was applied in a case where an automobile was represented to the buyer as being of the style and equipment of a certain year, but the car sent to him was of an earlier and inferior make.<sup>110</sup> So, where a seller of musical instruments knew that the buyer wanted a pianola piano, and knew that the instrument delivered was

<sup>106</sup> *Bright v. Siggins*, 2 Pa. Super. Ct. 106.

<sup>106</sup> *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Walker v. Swasey*, 2 Allen (Mass.) 312; *Chambers v. Wyatt* (Tex. Civ. App.) 151 S. W. 864.

<sup>107</sup> *Abbott v. Dow*, 133 Wis. 533, 113 N. W. 960; *Lindquist v. Gibbs*, 122 Minn. 205, 142 N. W. 156; *Smith v. Roseboom*, 10 Ind. App. 126, 37 N. E. 559.

<sup>108</sup> *Kenyon Printing & Mfg. Co. v. Barnsley Bros. Cutlery Co.*, 143 Mo. App. 518, 127 S. W. 666; *Howe Mach. Co. v. Willie*, 85 Ill. 333; *Doylestown Agr. Co. v. Brackett, Shaw & Lunt Co.*, 109 Me. 301, 84 Atl. 146; *People v. O'Brien*, 209 N. Y. 368, 103 N. E. 710; *Handy v. Roberts* (Tex. Civ. App.) 165 S. W. 37.

<sup>109</sup> *Smith v. Kingman*, 70 Minn. 453, 73 N. W. 253.

<sup>110</sup> *Grout v. Moulton*, 79 Vt. 122, 64 Atl. 453.



not a pianola, but did not inform the buyer of the fact, and the latter received the instrument on the seller's assurance that it was what he wanted, it was held that the buyer might rescind, whether or not the seller made a mistake.<sup>111</sup> So where the buyer of an alleged imported Percheron stallion was induced to purchase by the seller's false representations that the horse was imported and a Percheron, and was without knowledge that such statements were untrue, he was held entitled to maintain an action for rescission of the sale.<sup>112</sup> In another case, it appeared that the plaintiff undertook and contracted to perform a certain comedy act or vaudeville turn at the defendant's theater. Defendant had previously seen plaintiff perform this act and was pleased with it, and contracted on the supposition that it would be rendered in the same form and manner at his theater. But the performance as presented under the contract was materially different from that previously given. It was held that the defendant was justified in terminating the contract.<sup>113</sup>

Similar rules apply in cases where, although the subject of the contract remains the same, there is a fraudulent substitution of parties. Where one person is engaged to act as the agent of the other in a matter of purchase or sale, and, pretending to have found a purchaser or buyer, or to have negotiated with a third person, substitutes himself as the other party to the contract, it is a breach of trust in the nature of a constructive fraud, and warrants the rescission of the contract.<sup>114</sup> Thus, if one employs another as his agent to purchase for him a certain amount of stock in a given company, and the agent, in the pretended fulfillment of his duty, but with the intention of deceiving and defrauding his principal, buys no stock but transfers to his principal his own holdings in the company, and receives and retains the money paid therefor, the principal has the

<sup>111</sup> *Smith & Nixon Co. v. Lewis* (Ky.) 112 S. W. 1113.

<sup>112</sup> *Brucker v. Kairn*, 89 Neb. 274, 131 N. W. 382.

<sup>113</sup> *McLaughlin v. Hammerstein*, 99 App. Div. 225, 90 N. Y. Supp. 943.

<sup>114</sup> *Rohrof v. Schulte*, 154 Ind. 183, 55 N. E. 427; *Peuchen v. Behrend*, 54 App. Div. 585, 66 N. Y. Supp. 1092.

right to rescind the contract because of its fraudulent performance.<sup>115</sup> But the mere fact that a purchaser of land presents to the seller a deed running to a different grantee than the one named in the contract, and procures its execution without the grantor's being aware of the difference, is not such a fraud as will warrant the intervention of a court of equity.<sup>116</sup> And so the fact that a purchaser of land takes title in the name of a third person, his father, does not, in the absence of any other circumstances showing fraud, constitute a fraud on the grantor, although the latter believes the purchaser to be the one named in the deed.<sup>117</sup>

**§ 30. Conspiracy, Bribery, and Perjury.**—A common type of fraud is found in the case where several persons conspire together to induce another to part with his money or property, by means of false representations or a trick, each of the confederates having his own part to play in the plot, and the cumulative effect of their combined efforts being the deception and plundering of the victim. Each of the persons who participates in such a scheme is liable for the damages sustained thereby,<sup>118</sup> and where a number of persons thus pursue a common scheme, and by their acts render themselves liable to an action for deceit, they are not relieved from that liability by the fact that they afterwards use a corporate form as a means to advance the business in hand.<sup>119</sup> Further, the defrauded party in such a case may rescind the transaction as against each and all of the conspirators, although no one of them went far enough with the plot, considering only his own words or actions, to make out a case of fraud against him.<sup>120</sup> Thus, if sev-

<sup>115</sup> *Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985; *Miller v. Curtiss*, 59 N. Y. Super. Ct. 503, 15 N. Y. Supp. 140. Compare *Talbott v. Manard*, 106 Tenn. 60, 59 S. W. 340.

<sup>116</sup> *United States v. Payette Lumber & Mfg. Co.* (D. C.) 198 Fed. 881.

<sup>117</sup> *Hall v. Bollen*, 148 Ky. 20, 145 S. W. 1136, Ann. Cas. 1913E, 436.

<sup>118</sup> *Wickersham v. Johnson*, 51 Mo. 313; *Brucker v. Kairn*, 89 Neb. 274, 131 N. W. 382.

<sup>119</sup> *Baker v. Crandall*, 7 Mo. App. 564.

<sup>120</sup> *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

eral persons enter into a fraudulent agreement that certain false representations shall be made to another, to induce him to enter into a transaction with them, it is enough to justify the rescission of the contract that such representations were actually made (with knowledge of their falsity) by any one or more of the conspirators, not necessarily by each and all of them.<sup>121</sup> Neither is it necessary to prove a conspiracy in the strict sense of the term. Concert of action by several persons, fraudulently inducing another to enter into a transaction, is enough to render them liable for the fraud.<sup>122</sup> And a party to the plot, who participates in the spoils, cannot escape liability on the ground that he was not cognizant of the specific acts of deceit practised by his associates, if he could have informed himself thereof,<sup>123</sup> nor on the ground that his participation was not the special cause which induced the victim to act. Thus, in an action of deceit against the directors and officers of a bank, who published a false report as to its financial condition, upon which the plaintiff relied, one of the directors cannot escape liability on the ground that there was no special reliance upon him, where it appears that the plaintiff relied on the report and on the entire directorate.<sup>124</sup> Again, it is not necessary, in such a case, that all of the conspirators should have been principals or equally active in the fraud. Those who have actual or constructive knowledge of the fraudulent character of an enterprise, and with such knowledge aid and abet its furtherance, and by means of false representations induce a person to invest in it, are all jointly and equally liable with the principal in the enterprise.<sup>125</sup> Even one who knowingly accepts the benefit of a contract procured by another by fraud, partly in his interest, or who, without having participated in the original fraud, claims and receives a part of the fruits thereof, be-

<sup>121</sup> *I. L. Corse & Co. v. Minnesota Grain Co.*, 94 Minn. 331, 102 N. W. 728.

<sup>122</sup> *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504.

<sup>123</sup> *Baker v. Crandall*, 7 Mo. App. 564.

<sup>124</sup> *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596.

<sup>125</sup> *White v. Moran*, 134 Ill. App. 480; *Morehouse v. Yeager*, 71 N. Y. 594.

comes equally liable for the fraud.<sup>126</sup> For example, an action was brought to recover money bet on a race, the result of which was determined in advance, and the plaintiff joined as defendants, with the conspirators, a bank and its cashier, who were alleged to have assisted in the plot by allowing the use of the bank for the transference of money and to give an air of respectability to the affair, and it was held that they were liable, on this ground, although their further participation in the scheme, by assuring the plaintiff that the conspirators were men of honor, had nothing to do with the result because the plaintiff knew the fact to be otherwise.<sup>127</sup> But no one can be held liable unless there is evidence to connect him in some way with the conspiracy, either as a principal, as an abettor, or as a sharer in the resulting gains.<sup>128</sup>

Another type of conspiracy is that which involves the co-operation of several persons, all acting in concert for a common purpose but each confining his activity to one detail, because the successful carrying through of the plot requires more actors than one. For instance, where persons conspire to obtain large tracts of government land, by procuring others to enter the land in separate parcels as cash purchasers, and pay for it with money furnished by the main conspirators, and to hold the land in secret trust for them, whereby the conspirators expect to obtain title to land which they could not have obtained in their own names, the transaction is fraudulent and illegal, and the title acquired by the entrymen may be vacated in equity.<sup>129</sup> So, where a shipper of cotton procured a compress company to divide the bales and issue certificates for half bales as full bales, on which bills of lading were issued, on the faith of which plaintiffs paid drafts and were defrauded, it

<sup>126</sup> *Goldsmith v. Koopman*, 152 Fed. 173, 81 C. C. A. 465; *Blome v. Wahl-Henius Institute*, 150 Ill. App. 164.

<sup>127</sup> *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709.

<sup>128</sup> *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *De Klotz v. Broussard*, 203 Fed. 942, 122 C. C. A. 244.

<sup>129</sup> *Wilson Coal Co. v. United States*, 188 Fed. 545, 110 C. C. A. 343; *United States v. Robbins* (D. C.) 157 Fed. 999; *United States v. Clark* (C. C.) 129 Fed. 241.

was held that the compress company was a party to the fraud and liable for the damages.<sup>130</sup> A similar fraud, giving a right of rescission or to recover damages, is perpetrated by the use of a decoy, as where a respectable third person is put forward as being willing to join with the intended victim in the purchase of a piece of property or a patent right, each to pay half the stipulated price, but such person is only a "stool pigeon," having a secret agreement with the vendor that he is to pay no money at all but to have his half interest for the use of his name and influence.<sup>131</sup> Again, where the treasurer of a municipality, confederating with another to assist him in raising money, and for the purpose of misleading the public, takes a municipal warrant which really was illegally issued and is void, and indorses on it a statement that payment of it had been refused only because of a lack of funds, and officially certifies that it will be paid as soon as there are funds in hand, and thereby induces an innocent purchaser to take the warrant for a valuable consideration, he is liable to such purchaser.<sup>132</sup> And the case is essentially the same, as also the remedies, where the owner of a piece of land of little value, acting in confederation with another, places the title colorably in the name of such other, the deed reciting the payment of a large consideration in cash, and the confederate then places a mortgage on the property securing an issue of notes of considerable aggregate value, and they are disposed of in the market to unsuspecting purchasers.<sup>133</sup>

Still another type of fraudulent conspiracy is that which is worked out by a person occupying a position of trust or confidence towards the defrauded party, who treacherously and in betrayal of his trust colludes with a third person, for their joint advantage, to rob or cheat his principal. This kind of fraud always gives ground for an action for rescission or for the cancellation of any conveyance which

<sup>130</sup> *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Tex. Civ. App.) 154 S. W. 1032.

<sup>131</sup> *King v. White*, 119 Ala. 429, 24 South. 710.

<sup>132</sup> *Whitbeck v. Sees*, 10 S. D. 417, 73 N. W. 915.

<sup>133</sup> *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299; *Borders v. Kattleman*, 34 Ill. App. 582.

may have been made.<sup>134</sup> And the rules and principles are the same whether the conspirator be an agent for the victim,<sup>135</sup> or his attorney at law or in fact,<sup>136</sup> or his trustee for the benefit of creditors,<sup>137</sup> or a person entitled to his implicit confidence on account of the relationship between them, as in the case of a husband or wife or a brother.<sup>138</sup>

Bribery of a public official to do an act which is illegal or contrary to his duty, for the purpose and with the effect of defrauding a third person, is a form of fraud which warrants the latter in rescinding any obligation into which he may have entered. Thus, a person who has obtained a patent to public lands by means of bribery and corruption of officers of the government, will not be permitted, when his claim is questioned in a court of equity, to derive any benefit thereby, but the patent will inure to the party entitled to recover the land.<sup>139</sup> So a contract obtained by bribing those having control, for the purchase of state lands, is a fraud on the state, against public policy, and void, and the state may obtain its cancellation without returning or offering to return the money paid thereon.<sup>140</sup> On similar principles, in an action against a board of county commissioners for an alleged breach of a contract, whereby they accepted plaintiff's bid for doing certain work for the county, it is a sufficient defense that plaintiff, by promises of reward, induced another person, who had intended to bid a less sum, not to make a bid.<sup>141</sup>

Perjury also always involves fraud, and hence, for instance, patents to public lands which are procured by the use of false affidavits or testimony before the officers of the

<sup>134</sup> *Billboard Pub. Co. v. McCarahan*, 151 Ill. App. 227; *Cogswell v. Mitts*, 90 Mich. 353, 51 N. W. 514; *Jones v. Steelman*, 22 Wash. 636, 61 Pac. 764.

<sup>135</sup> *Mabry v. Randolph*, 7 Cal. App. 421, 94 Pac. 403.

<sup>136</sup> *Bush v. Prescott & N. W. R. Co.*, 76 Ark. 497, 89 S. W. 86; *Kilgore v. Norman* (C. C.) 119 Fed. 1006.

<sup>137</sup> *Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969.

<sup>138</sup> *Pribble v. Hall*, 13 Bush (Ky.) 61; *Lindley v. Kemp*, 38 Ind. App. 355, 76 N. E. 798.

<sup>139</sup> *Phillips v. George*, 17 Kan. 419; *Lynch v. United States*, 13 Okl. 142, 73 Pac. 1095.

<sup>140</sup> *State v. Cross*, 38 Kan. 696, 17 Pac. 190.

<sup>141</sup> *Jennings County Com'rs v. Verbarg*, 63 Ind. 107.

land department are fraudulent, and may be canceled for this reason at the suit of the United States.<sup>142</sup>

**§ 31. Insolvency of Purchaser and Intent Not to Pay.—** If one who is insolvent purchases goods on credit from another, with an intention not to pay for them, or with no reasonable expectation of being able to pay, and induces the sale by false representations concerning his financial ability, upon which the seller relies, or else by fraudulently concealing his insolvent condition, which would have prevented the sale if it had been known to the seller, then, in either case, the seller has the right to rescind the sale and recover his goods, and this, notwithstanding the fact that they may have passed into the possession of a trustee in bankruptcy or insolvency,<sup>143</sup> or he may even recover from

<sup>142</sup> *J. J. McCaskill Co. v. United States*, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; *Washington Securities Co. v. United States*, 194 Fed. 59, 114 C. C. A. 79.

<sup>143</sup> *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Montgomery v. Bucyrus Machine Works*, 92 U. S. 257, 23 L. Ed. 656; *Halsey v. Diamond Distilleries Co.*, 191 Fed. 498, 112 C. C. A. 142; *Bloomington v. Empire Rubber Mfg. Co.* (D. C.) 114 Fed. 1016; *In re Patterson* (D. C.) 125 Fed. 562; *In re Salmon* (D. C.) 145 Fed. 649; *William Openhym & Sons v. Blake*, 157 Fed. 536, 87 C. C. A. 122; *Haywood Co. v. Pittsburgh Industrial Iron Works* (D. C.) 163 Fed. 799; *Davis v. Stewart* (C. C.) 8 Fed. 803; *McKensie v. Rothschild*, 119 Ala. 419, 24 South. 716; *Bugg v. Wertheimer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Freeman v. Topkis*, 1 Marvel (Del.) 174, 40 Atl. 948; *Hacker v. Munroe*, 176 Ill. 384, 52 N. E. 12; *Peninsular Stove Co. v. Ellis*, 20 Ind. App. 491, 51 N. E. 105; *Curme v. Rauh*, 100 Ind. 247; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Reager v. Kendall*, 39 S. W. 257, 19 Ky. Law Rep. 27; *Lowry v. Hitch's Assignee*, 33 Ky. Law Rep. 573, 110 S. W. 833, 17 L. R. A. (N. S.) 1032; *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 413; *Gratton & Knight Mfg. Co. v. Troll*, 77 Mo. App. 339; *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *Stewart v. Emerson*, 52 N. H. 301; *Roth v. Palmer*, 27 Barb. (N. Y.) 652; *Ditton v. Purcell*, 21 N. D. 648, 132 N. W. 347, 36 L. R. A. (N. S.) 149; *Davis v. Cosel*, 4 Pa. Super. Ct. 519; *Richardson v. Vick*, 125 Tenn. 532, 145 S. W. 174; *Wertheimer-Schwartz Shoe Co. v. Faris* (Tenn. Ch. App.) 46 S. W. 336; *B. F. Avery & Sons v. Dickson* (Tex. Civ. App.) 49 S. W. 662; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94, 69 Pac. 648; *German Nat. Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Ann. Cas. 502; *Ferguson v. Carrington*, 9 Barn. & C. 59; *In re K. Marks & Co.*, 218 Fed. 453, 134 C. C. A. 253; *Scandinavian-American Trading Co. v. Skinner*, 56 Ind. App. 520, 105 N. E. 784.



such trustee the proceeds of the sale of the goods to a third person, provided the money accruing from the sale of the particular goods can be distinguished from other funds in the hands of such trustee.<sup>144</sup>

While the general principle, as above stated, is abundantly well supported by the authorities, there is still much difference of opinion as to the details of the various elements which make up the general rule. In the first place, however, it is very nearly settled that the actual insolvency of the purchaser at the time of the sale is strictly essential to found a right of rescission,<sup>145</sup> although some cases hold it sufficient to show that he was "in a failing condition" at the time,<sup>146</sup> and others maintain that it is not necessary to show insolvency, if specific misrepresentations as to his debts and assets are brought home to him and are shown to have induced the sale.<sup>147</sup> And a sale to two persons jointly, who are not partners, cannot be rescinded by the seller upon the insolvency of one of the purchasers, but he must make an offer of performance if the other is solvent.<sup>148</sup> Next, it is necessary that the fraudulent purchaser should have distinctly known the fact of his own insolvency,<sup>149</sup> and purchasers who merely have good reason to know or to believe that they are insolvent are not to be visited with the consequences of actual knowledge of that fact.<sup>150</sup> It is likewise essential that the fact of the purchaser's insolvency should not have been known to the seller. The latter will have no right to rescind the sale and reclaim the goods if he delivered them with knowledge that the buyer

<sup>144</sup> *Gillespie v. J. C. Piles & Co.*, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1; *In re Well* (D. C.) 111 Fed. 897.

<sup>145</sup> *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19; *In re Sol. Aarons & Co.*, 193 Fed. 646, 113 C. C. A. 514; *Pratt v. S. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368; *Landauer v. Espenhain*, 95 Wis. 169, 70 N. W. 287. And see *Loeschigk v. Peck*, 3 Rob. (N. Y.) 700.

<sup>146</sup> *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19.

<sup>147</sup> *In re Bendall* (D. C.) 183 Fed. 816.

<sup>148</sup> *Soloman v. Neldig*, 1 Daly (N. Y.) 200.

<sup>149</sup> *Hartwell v. Receivers of Carlisle Mfg. Co.*, 17 Pa. Co. Ct. Rep. 565.

<sup>150</sup> *Diggs v. Denny*, 86 Md. 116, 37 Atl. 1037.



was in failing or precarious circumstances,<sup>151</sup> or that he was heavily embarrassed and was carrying on his business only by the grace of his creditors,<sup>152</sup> or if the seller fairly understood the buyer's weak financial condition and situation,<sup>153</sup> or did not take an offered security because he thought the purchaser was abundantly able to pay.<sup>154</sup> As to the meaning of "insolvency," the common-law definition was that it was the condition of one who is not able to meet his debts as they mature in the ordinary course of business.<sup>155</sup> But this definition has generally given way to that brought into force by the federal bankruptcy act, namely, that a person is insolvent when the aggregate of all his assets, if brought together and converted into cash, would not be sufficient to pay off all his debts and liabilities.<sup>156</sup>

But the mere insolvency of a buyer of goods on credit does not, by itself alone, justify the seller in refusing to deliver or in rescinding the sale after delivery and reclaiming the goods, though the purchaser was aware of his own financial condition and omitted to disclose it, provided he had not at the time a fraudulent intention with respect to getting the goods without paying for them.<sup>157</sup> And such

<sup>151</sup> *In re Sweeney*, 168 Fed. 612, 94 C. C. A. 90; *Chase v. Miller*, 90 Va. 323, 18 S. E. 277.

<sup>152</sup> *Hill Veneer Co. v. Monroe* (C. C.) 189 Fed. 834.

<sup>153</sup> *In re Hess* (D. C.) 138 Fed. 954.

<sup>154</sup> *Boone v. Collins*, 43 Ga. 278.

<sup>155</sup> *Phelps, Dodge & Palmer Co. v. Samson*, 113 Iowa, 145, 84 N. W. 1051.

<sup>156</sup> *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666; *In re Rome Planing Mill Co.* (D. C.) 99 Fed. 937; *Mackel v. Bartlett*, 36 Mont. 7, 91 Pac. 1064; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Mann v. Salsberg*, 17 Pa. Super. Ct. 280; *Noble v. Worthy*, 1 Ind. T. 458, 45 S. W. 137. That a debtor's property is so situated that it cannot be reached by process of law and subjected, without his consent, to the payment of his debts, may constitute insolvency, within the meaning of the rule stated in the text. *Pelham v. Chattahoochee Grocery Co.*, 156 Ala. 500, 47 South. 172.

<sup>157</sup> *Roberts Cotton Oil Co. v. F. E. Morse & Co.*, 97 Ark. 513, 135 S. W. 334; *Freeman v. Topkis*, 1 Marvel (Del.) 174, 40 Atl. 948; *West v. Graff*, 23 Ind. App. 410, 55 N. E. 506; *Levi v. Bray*, 12 Ind. App. 9, 39 N. E. 754; *Holmes v. Henderson*, 12 Ind. App. 698, 40 N. E. 151; *J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co.*, 149 Iowa, 272, 128 N. W. 389, 30 L. R. A. (N. S.) 1184; *Reid v. Lloyd*, 67 Mo. App. 513; *Pinckney v. Darling*, 158 N. Y. 728, 53 N. E. 1130; *Hirsch Lumber Co. v. Hubbell*, 143 App.

known and undisclosed insolvency is not by itself sufficient evidence that the purchaser had no intention of paying for the property, so as to justify the avoidance of the sale by the vendor on this ground.<sup>158</sup>

In the next place, many of the cases apply the strict rule that the purchaser must have had an actual intention not to pay for the goods at the time he acquired them, that is, a positive and predetermined intention, entertained and acted upon at the time of making the purchase, never to pay for the goods.<sup>159</sup> Hence the sale cannot be rescinded on this ground if the vendee can make it appear by satisfactory evidence that, at the time of buying the property, he had an honest intention of paying the price and reasonably thought he would be able to do so at the appointed time, even though he then knew himself to be insolvent and unable to pay,<sup>160</sup> or even if the purchase was made with a hope that he would be able to pay and with an intention to

Div. 317, 128 N. Y. Supp. 85; *Johnson v. Groff*, 22 Pa. Super. Ct. 85; *Paul v. Eurich*, 3 Pa. Super. Ct. 299; *Slayden-Kirksey Woolen Mills v. Weber*, 46 Tex. Civ. App. 433, 102 S. W. 471; *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337.

<sup>158</sup> *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *German Nat. Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Ann. Cas. 502. But see *Gratton & Knight Mfg. Co. v. Troll*, 77 Mo. App. 339, where it is said that insolvency, with the additional proof that the purchaser, at the time of the sale, knew his insolvency to be so gross and complete that he would not be able to pay for the goods, is tantamount to an intention not to pay for them.

<sup>159</sup> *In re Sol. Aarons & Co.*, 193 Fed. 646, 113 C. C. A. 514; *In re Levi* (D. C.) 148 Fed. 654; *Catlin v. Warren*, 16 Ill. App. 418; *Houghtaling v. Hills*, 59 Iowa, 287, 13 N. W. 305; *Munzer v. Stern*, 105 Mich. 523, 63 N. W. 513, 29 L. R. A. 859, 55 Am. St. Rep. 468; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. 637; *David Adler & Sons Clothing Co. v. Thorp*, 102 Wis. 70, 78 N. W. 184.

<sup>160</sup> *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *Wachtel v. Reichel*, 19 Ohio Cir. Ct. R. 626; *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. 747; *Rome Furniture & Lumber Co. v. Walling* (Tenn. Ch. App.) 58 S. W. 1094. The fact that a vendee of goods bought on credit knew that he was unable to pay for the goods, when the same were ordered, is not equivalent to an intention not to pay for them. It is the knowledge that he will not be able to pay for them which constitutes the vitiating fraud which authorizes a rescission by the vendor. *Reid v. Lloyd*, 67 Mo. App. 513.

pay if possible.<sup>161</sup> And further, to avoid the sale on this ground, the purchaser must have entertained an intention not to pay in any event, an intention merely not to pay according to the contract not being sufficient,<sup>162</sup> nor an intention to force the seller to credit the price of the goods on a claim for damages which the purchaser is urging against him.<sup>163</sup> Again, the intention not to pay must have been formed at the time of making the contract, or at any rate before or at the time of receiving the goods.<sup>164</sup> An intention to refuse or evade payment, and thereby to defraud the seller, conceived some time after the sale, is not equivalent to the necessary predetermined intention.<sup>165</sup> Thus, a sale cannot be rescinded as fraudulent, though the buyer knew that he was insolvent and made no statement as to his condition, and though he mortgaged the goods on the same day he received them and soon after made an assignment for the benefit of creditors, where it appears that, at the time of ordering the goods, he intended to pay for them and had no thought of mortgaging them until after they were in his store and he was threatened with suit by a third person.<sup>166</sup> As to the difficult matter of showing this secret purpose in the mind of the purchaser, it is said that "the intent not to pay for property bought on credit may be proved by evidence of other fraudulent purchases, part of the same scheme of fraud, by the secreting of the property bought as soon as obtained, or by turning it over to another creditor, or by evidence of admissions or of subsequent conduct indicating a design to defraud, or by other circumstances."<sup>167</sup> Thus, where a merchant obtains goods

<sup>161</sup> *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117.

<sup>162</sup> *Beebe v. Hatfield*, 67 Mo. App. 609; *Strickland v. Willis* (Tex. Civ. App.) 43 S. W. 602.

<sup>163</sup> *Royal Remedy & Extract Co. v. Gregory Grocer Co.*, 90 Mo. App. 53.

<sup>164</sup> *Ayers v. Farwell*, 196 Mass. 349, 82 N. E. 35.

<sup>165</sup> *Leedom v. Mayer*, 114 Wis. 267, 90 N. W. 169.

<sup>166</sup> *Consolidated Milling Co. v. Fogo*, 104 Wis. 92, 80 N. W. 103; *England v. Adams*, 157 Mass. 449, 32 N. E. 665.

<sup>167</sup> 1 *Benj. Sales* (Corbin's edn.) § 656, note, citing *Wiggin v. Day*, 9 Gray (Mass.) 97; *Parker v. Byrnes*, 1 Lowell, 539, Fed. Cas. No. 10,728; *Jordan v. Osgood*, 109 Mass. 462, 12 Am. Rep. 731; *Davis v. McWhirter*, 40 U. C. Q. B. 598. And see *Samaha v. Mason*, 27 App. D. C. 470; *Hallacher v. Henlein* (Tenn. Ch. App.) 39 S. W. 869.

on credit with the intention of at once placing them beyond the reach of his creditors by exchanging his whole stock for a homestead, the proceeding is evidence of a fraudulent intent in the purchase of the goods at the outset.<sup>168</sup> So where he confesses a judgment to a third person which is enforceable at once, and the effect of which, as he knows, will be to disable him from carrying on his business.<sup>169</sup> So, where an insolvent corporation orders large quantities of goods in anticipation of its failure, and for the purpose of surrendering them to a preferred creditor, and the carrying out of the scheme is started by a fraudulent attachment of the goods at the suit of such creditor, it is such evidence of an intention not to pay as will warrant the seller in rescinding.<sup>170</sup> And a like ruling was made in a case where an insolvent firm executed mortgages covering its entire stock to a bank, which mortgages were not recorded, and then bought goods from the plaintiff, and before delivery thereof agreed with the bank that it should collect all accounts of the firm and apply the proceeds on the mortgages.<sup>171</sup> But even the fact that defendant's entire capital had been secured by obtaining the discounting of forged notes is not so inconsistent with an intention on his part to pay for goods purchased that the goods may be retaken by the seller on the ground of fraud.<sup>172</sup> It should here be observed that if the goods have not yet been delivered, the seller will be justified in refusing to ship them when facts come to his knowledge which induce a reasonable doubt of the purchaser's ultimate intention to pay for them.<sup>173</sup>

But in several of the states, the authorities do not go to the length of requiring a fixed and preconceived intention not to pay, as an essential element of the fraud which will justify a rescission of the sale. They hold that if the buyer knew of his own insolvency and knew that he would not

<sup>168</sup> *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935.

<sup>169</sup> *Claster v. Katz*, 6 Pa. Super. Ct. 487.

<sup>170</sup> *Craig v. California Vineyard Co.*, 30 Or. 43, 46 Pac. 421. But compare *Levi v. Bray*, 12 Ind. App. 9, 39 N. E. 754.

<sup>171</sup> *Deere v. Morgan*, 114 Iowa, 287, 86 N. W. 271.

<sup>172</sup> *Sinnott v. German-American Bank*, 164 N. Y. 386, 58 N. E. 286.

<sup>173</sup> *Bostick v. Mendenhall*, Man. Unrep. Cas. (La.) 113.

be able to pay for the goods when due, or had no reasonable expectation of being able to pay, this is a state of facts legally equivalent to the holding of an intention not to pay, or at least a state of facts from which such an intention may legally be presumed.<sup>174</sup> If, however, there does exist an intention of not paying for the goods, this is the gist of the fraud, and in this case the sale may be avoided or rescinded though there were no fraudulent representations or no concealment of the fact of insolvency, these being not necessary elements, but evidentiary facts tending to establish the intent not to pay.<sup>175</sup> Or, according to

<sup>174</sup> *In re Berg* (D. C.) 183 Fed. 885; *In re Hamilton Furniture & Carpet Co.* (D. C.) 117 Fed. 774; *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19; *McKensie v. Rothschild*, 119 Ala. 419, 24 South. 716; *Wilk v. Key*, 117 Ala. 285, 23 South. 6; *John Blaul & Sons v. Wandel*, 137 Iowa, 301, 114 N. W. 899; *Diggs v. Denny*, 86 Md. 116, 37 Atl. 1037; *Edelhoff v. Horner-Miller Straw Goods Mfg. Co.*, 86 Md. 595, 39 Atl. 314; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Wilmot v. Lyon*, 11 Ohio Cir. Ct. R. 238; *Boaz v. Coulter Mfg. Co.* (Tex. Civ. App.) 40 S. W. 866; *Contra, Dorman v. Weakley* (Tenn. Ch. App.) 39 S. W. 890. In *Talcott v. Henderson*, *supra*, it was said: "An intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase, and concealed from the vendor, is unquestionably such a fraud as will vitiate the contract. But it is as certainly true, on the other hand, that, where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase. Whether, therefore, a contract of purchase, where the purchaser fails to disclose his known insolvency, is fraudulent or not depends on the intention of the purchaser, and whether that intention was to pay or not to pay is a question of fact and not a question of law. In the solution of this question, though it be one of fact, it is true, however, that certain presumptions arise which are entitled to consideration and force. Thus, while it may be said that fraud must be proved and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence if a purchaser of goods has knowledge of his own insolvency and of his inability to pay for them, his intention not to pay should be presumed. I would go a step farther, and hold that an insolvent purchaser, without reasonable expectations of ability to pay should be presumed to intend not to pay. Indeed, I would not deny that an intention not to pay might be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency, but in such case the inference may be rebutted by other facts and circumstances."

<sup>175</sup> *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R.

some of the cases, a buyer, in giving his order and receiving the goods, is to be understood as impliedly representing that he intends to pay for them, and is guilty of fraud if he entertains a contrary intention.<sup>176</sup> But the fraud does not consist in the unfulfilled promise to pay, but in the express or implied false representation of an intention to pay.<sup>177</sup> On the other hand it is not fraudulent per se for a person who is insolvent or in embarrassed circumstances to buy goods, withholding from the seller information as to the actual condition of his business affairs, but with this there must be combined an intention not to pay for the property, or otherwise to cheat the seller.<sup>178</sup>

But the chief difference of opinion among the authorities arises upon the question whether or not there must coexist with the foregoing elements of fraud a false representation of solvency or some trick or device to deceive the seller on this point, and thereby to get credit which would not otherwise have been given. It is held, by a very strong line of authorities, that no actual misrepresentation or affirmative fraudulent concealment as to his solvency by a purchaser of goods on credit is necessary to entitle the seller to rescind, but the sale is rescindable for fraud if the purchaser, being at the time insolvent and knowing the fact, and having no intention of paying for the goods or no reasonable expectation of being able to do so, fails to disclose his financial condition to the seller and is silent with regard to his intention or expectation as to payment, provided that the seller was induced by such concealment and silence to make the sale.<sup>179</sup> But some of the cases, while

A. (N. S.) 245; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881; *Reager v. Kendall*, 19 Ky. Law Rep. 27, 39 S. W. 257; *Morrill v. Blackman*, 42 Conn. 324. And see *W. W. Johnson Co. v. Triplett*, 66 Ark. 233, 50 S. W. 455.

<sup>176</sup> *Phelps, Dodge & Palmer Co. v. Samson*, 113 Iowa, 145, 84 N. W. 1051; *Atlanta Skirt Mfg. Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077.

<sup>177</sup> *McCready v. Phillips*, 56 Neb. 446, 76 N. W. 885.

<sup>178</sup> *Harrisburg Pipe-Bending Co. v. Welsh*, 26 App. Div. 515, 50 N. Y. Supp. 299.

<sup>179</sup> *Union Manufacturing & Commission Co. v. East Alabama Nat. Bank*, 129 Ala. 292, 29 South. 781; *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am.

accepting this rule in the main, hold that there must be a "concealment" of the fact of insolvency, that is, some falsehood on this point, or some successful effort either to mislead the seller or to induce him to forbear making an investigation, and that the mere failure of the purchaser to volunteer information, or his mere silence as to his financial condition when no inquiry is made, is not equivalent to concealment, and therefore not such fraud as to vitiate the sale.<sup>180</sup> And in some jurisdictions (notably Pennsylvania) it is settled law that, in order to constitute such fraud as will render a sale void or rescindable by the seller, the buyer's intention not to pay the price and his concealment of his own insolvency are not alone sufficient, but in addition there must have been some artifice or trick, intended and fitted to deceive the vendor, or some false pretense or false representation.<sup>181</sup> But a fraud is committed within the meaning of this rule (the other elements being present) if the buyer falsely represents that he owns a valuable farm and has other means amply sufficient for his business, and always buys for cash, and owes no debts,<sup>182</sup> or if he obtains

St. Rep. 19; *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 South. 1009; *Upchurch v. Mizell*, 50 Fla. 456, 40 South. 29; *Tennessee Coal, Iron & R. Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; *In re Spann* (D. C.) 183 Fed. 819; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Johnson v. O'Donnell*, 75 Ga. 453. Compare *In re Davis* (D. C.) 112 Fed. 294. In Georgia, the rule stated in the text is enacted into statutory law. "Where one who is insolvent purchases goods, and, not intending to pay therefor, conceals his insolvency and intention not to pay, the vendor may disaffirm the contract and recover the goods, if no innocent third person has acquired an interest in them." Civ. Code Ga., § 4111.

<sup>180</sup> *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *Kaminer v. Wolf*, 13 Ohio Cir. Ct. R. 612; *Strickland v. Willis* (Tex. Civ. App.) 43 S. W. 602.

<sup>181</sup> *Smith v. Smith*, 21 Pa. 367, 60 Am. Dec. 51; *Backentoss v. Spelcher*, 31 Pa. 324; *Rodman v. Thalheimer*, 75 Pa. 232; *Diller v. Nelson*, 10 Pa. Super. Ct. 449; *Shirk v. Konigmacher*, 3 Pa. Super. Ct. 45; *North American Smelting Co. v. Temple*, 12 Pa. Super. Ct. 99; *Collings Tailor Co. v. Appenzellar*, 42 Pa. Super. Ct. 414; *Reed v. Felmlee*, 25 Pa. Super. Ct. 37; *In re Lewis* (D. C.) 125 Fed. 143; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *Levi v. Bray*, 12 Ind. App. 9, 39 N. E. 754; *Holmes v. Henderson*, 12 Ind. App. 698, 40 N. E. 151.

<sup>182</sup> *Kline v. Baker*, 99 Mass. 253.



a fictitious credit with the seller by making false returns of property for taxation,<sup>183</sup> or if, about the time of the delivery of the goods, he executes a judgment note and a bill of sale to a creditor, which practically closes up his business.<sup>184</sup>

Finally, if a sale of chattels was induced and procured by means of false and fraudulent representations made by the buyer, this alone constitutes a sufficient ground for the seller to rescind and reclaim his goods, without the necessity of showing that the purchaser did not at the time intend to pay for them, and even though, as a matter of fact, the purchaser did actually expect and intend to pay, his purpose in this respect being immaterial.<sup>185</sup> "Where a sale of goods is induced by false and fraudulent representations, intention to pay for them does not sanctify the fraud, and the party defrauded is entitled to rescind without regard to such intention. In such a case of active and aggressive fraud, the question whether or not the wrongdoer intended to pay is immaterial."<sup>186</sup> It is said, however, that the false representations or statements must have been made to the particular vendor, and it is not enough for him to show a general scheme to defraud creditors.<sup>187</sup>

**§ 32. Frauds by Agents and Other Third Persons.**—A contract or conveyance may be rescinded for fraud, although the principal in the transaction was not personally guilty of any fraud, where fraud was practised by his agent or representative or by a third person, and the principal either procured or authorized it or knowingly took the benefit of it, or if the agent was acting in the ordinary course

<sup>183</sup> *Selsel v. Wells*, 99 Ga. 159, 25 S. E. 266.

<sup>184</sup> *Bughman v. Central Bank*, 159 Pa. 94, 28 Atl. 209.

<sup>185</sup> *Ellet-Kendall Shoe Co. v. Ward*, 187 Fed. 982, 110 C. C. A. 320; *La Salle Pressed-Brick Co. v. Coe*, 65 Ill. App. 619; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Gallipolis Furniture Co. v. Symmes*, 10 Ohio Ctr. Ct. R. 659; *Hart v. Moulton*, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881; *In re Hamilton Furniture & Carpet Co.* (D. C.) 117 Fed. 774; *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40.

<sup>186</sup> *In re Hamilton Furniture & Carpet Co.* (D. C.) 117 Fed. 774.

<sup>187</sup> *In re O'Connor* (D. C.) 112 Fed. 666. But compare *In re Johnson* (D. C.) 208 Fed. 164.



of his business and employment.<sup>188</sup> "Deceits and frauds practised by agents do not fall upon the principal unless the principal adopts and takes the benefit of the fraudulent act with knowledge of the fraud, or unless the fraud was committed by the agent in the transaction of the ordinary business of the principal. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's or principal's benefit, though no express command or privity by the master or principal be proved."<sup>189</sup> And where a principal and agent jointly participate in and share the fruits of actionable fraud, they are jointly liable for the resulting damages.<sup>190</sup> Thus, a person who has been induced to purchase shares of stock in a corporation by the fraud of the agent of the company, has a remedy by rescission of his contract of purchase and reclamation of the money he has paid. But "if he is once debarred from seeking that relief by the declared insolvency of the company or from any other cause, there is no other remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud."<sup>191</sup> The rule also applies to sales of property at auction. Standing by and hearing the auctioneer make a false statement concerning the property, without correcting him, constitutes an acquiescence on the vendor's part in the false statement made by the auctioneer, and is an active fraud.<sup>192</sup> So, where the agents for the sale of land conceal from the purchaser the fact that they are part owners of the land, and instead express an intention to purchase an interest themselves upon the same terms as are offered to the purchaser, such representations will constitute such a fraud as will avoid the

<sup>188</sup> *Felt v. Bell*, 205 Ill. 213, 68 N. E. 794; *McDonald v. Metropolitan Life Ins. Co.*, 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548; *Rankin v. Rankin* (Tex. Civ. App.) 134 S. W. 392; *Porter v. O'Donovan*, 65 Or. 1, 130 Pac. 393.

<sup>189</sup> 2 *Add. Torts* (Wood's edn.) § 1197, citing *Udell v. Atherton*, 7 Hurl. & N. 181; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Bostock v. Floyer*, L. R. 1 Eq. Cas. 26.

<sup>190</sup> *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275.

<sup>191</sup> 1 *Benj. Sales*, § 709.

<sup>192</sup> *Dayton v. Kidder*, 105 Ill. App. 107.

sale.<sup>193</sup> But the mere fact that a vendor paid to his agent a very liberal commission for making the sale does not necessarily show that fraud was practised on the purchaser.<sup>194</sup>

On the other hand, a party to a contract cannot have it set aside for fraud practised upon him by a third person, not the agent of the other party, where such other did not instigate the fraud nor participate in it, and did not knowingly take a benefit or gain attributable to it.<sup>195</sup> Thus, in one of the cases it appeared that the plaintiff was induced by his co-owners to convey his one-third interest in certain mining property, they representing to him that the entire property was to be sold for \$8,000, whereas in fact, by a secret agreement with the purchaser, they were to receive, in addition to their share of the purchase price, \$20,000 in capital stock of a corporation to be organized to work the property. The purchaser had knowledge of the fraud thus practised upon the plaintiff by his co-owners, but he did not participate in the deception, nor did he benefit by it, since the concealment did not enable him to acquire the property at any better price, nor otherwise operate to his advantage. And it was held that the relation of the purchaser to the plaintiff was different from that of the co-owners, and that a judgment against him for a proportionate share of the stock issued was wrong.<sup>196</sup> And again, the fact that the organizers of a syndicate for the purpose of buying land were also agents for the sale of the land will not avoid the sale, where the vendor had no knowledge of such syndicate.<sup>197</sup> In another illustrative case, it was

<sup>193</sup> *Wren v. Moncure*, 95 Va. 369, 28 S. E. 588.

<sup>194</sup> *Brackett v. Carrico*, 18 Ky. Law Rep. 874, 38 S. W. 694.

<sup>195</sup> *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89; *Robinson v. Glass*, 94 Ind. 211. This is also the rule by statute in Louisiana. "If the artifice be practised by a party to the contract, or by another with his knowledge or by his procurement, it vitiates the contract; but if the artifice be practised by a third person, without the knowledge of the party who benefits by it, the contract is not vitiated by the fraud, although it may be void on account of error [mistake] if that error be of such a nature as to invalidate it; in this case, the party injured may recover his damages against the person practising the fraud." Rev. Civ. Code La., § 1847.

<sup>196</sup> *Upton v. Weisling*, 8 Ariz. 298, 71 Pac. 917.

<sup>197</sup> *Quinlan v. Keen*, 72 Ill. App. 129.

shown that the defendant was induced to purchase a worthless tract of land by extravagant assurances as to the existence and value of mineral veins supposed to underlie it. These representations were made by a person who professed to be able to detect the presence of minerals by the "impressions produced by passing over the place." Also a spiritualistic medium had advised the purchase. The evidence seemed to show that the vendor knew of the influences at work upon the purchaser, and that he took advantage of them to demand an extravagant price for the land, but aside from this, no fraud was brought home to him. It was held that these facts constituted no defense to a suit to foreclose a purchase-money mortgage.<sup>198</sup> On the same principle, if a husband practises fraud, compulsion, or undue influence upon his wife, to induce her to execute a deed or a mortgage of her property, it cannot avail her against the grantee or mortgagee, if the latter did not instigate or participate in the fraud or improper influence.<sup>199</sup>

**§ 33. Agent Wrongly Exceeding Authority.**—Where an agent, in making a contract with a third person, wrongly exceeds his authority or acts contrary to his instructions, it constitutes a constructive fraud against his principal, and may make him liable in damages to the latter.<sup>200</sup> But it does not necessarily follow that the principal will be entitled to rescind the contract as against the other party to it. That must in general depend upon whether or not the latter had knowledge of the wrong done by the agent and meant to profit by it.<sup>201</sup> Thus, an action cannot be maintained to cancel a policy of fire insurance at the instance of the company, as having been obtained by fraud, after a

<sup>198</sup> *Law v. Grant*, 37 Wis. 548.

<sup>199</sup> *Mohr v. Griffin*, 137 Ala. 456, 34 South. 378; *Butner v. Blevins*, 125 N. C. 585, 34 S. E. 629; *Shell v. Holston Nat. B. & L. Ass'n* (Tenn. Ch. App.) 52 S. W. 909; *Walker v. Nicrosi*, 135 Ala. 353, 33 South. 161. But see *Cage v. Perry* (Tex. Civ. App.) 142 S. W. 75.

<sup>200</sup> As where a broker, by certain representations to a customer, succeeded in selling him a piece of land for a price greater than that asked by the owner, and kept the difference. He was held guilty of fraud and deceit, making him liable to the customer. *Hokanson v. Oatman*, 165 Mich. 512, 131 N. W. 111, 35 L. R. A. (N. S.) 423.

<sup>201</sup> *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94. And see *Schultz v. McLean* (Cal.) 25 Pac. 427.

loss has occurred, on the ground that the agent of the company who wrote the policy was not permitted to insure property at the particular place, where the assured shows that he had no knowledge of any such limitation on the agent's powers and took out the policy in good faith.<sup>202</sup> So, where an agent made a contract to sell land to defendant at a price less than what he was authorized to take, and he had sold other land in the same survey for the same owners and had acted as their agent for years, and the defendant, supposing that the agent had full authority to sell on the terms agreed, occupied the land for a year, making valuable improvements thereon, without being notified that the contract was invalid, it was held that, if the owner refused to accept the contract as made by his agent, defendant was entitled to be compensated for his improvements.<sup>203</sup> On the other hand, however, in a case in Mississippi, where the agent of a water company, without authority, executed a contract to furnish water at rates below the company's regular tariff rates, it was held that the court of chancery had jurisdiction of a suit to cancel the contract, although the complainant could obtain redress by refusing to carry it out.<sup>204</sup> And so, where a deed to land by an agent is void for want of written authority on his part to fill in a blank left for the name of the grantee, the grantee should not be adjudged to reconvey the land, but he should be ordered to deliver up the deed for cancellation, as the deed, being void in its inception, conveyed no title.<sup>205</sup> Naturally the other party to the contract may rescind it when he finds that the agent with whom he has been dealing has exceeded or contravened his authority. But it is no ground for the rescission of a contract for the sale of land that one who sold the land as agent had no authority to act, if the principal ratifies his act and is able and willing to make title.<sup>206</sup>

**§ 34. Collusion with Agent of Other Party.**—If one of the parties to a business transaction does not deal directly

<sup>202</sup> *Phoenix Ins. Co. v. Smith*, 95 Miss. 347, 48 South. 1020.

<sup>203</sup> *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, 42 S. W. 617.

<sup>204</sup> *Meridian Water Works Co. v. Marks* (Miss.) 16 South. 357.

<sup>205</sup> *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266.

<sup>206</sup> *Alderson v. Harris*, 12 Ala. 580.

with the other party, but with the latter's agent or employé, and enters into a secret and corrupt agreement with the agent, by which the agent undertakes, for a reward or commission given or promised, to induce his principal to contract with the party so bribing him, or to sell the property to him, or otherwise to deal with him, according to the case, the transaction is so far tainted with fraud that the principal may rescind and repudiate it, if he acts with due promptness upon discovering the facts.<sup>207</sup> "It is too well settled to admit of discussion that no sale where any substantial advantage has been taken can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when he was in reality the secret agent for the purchaser. It inaugurates so dangerous a conflict between duty and self-interest to allow the agent of a vendor to become interested as the purchaser, or the agent of a purchaser, in the subject-matter of his agency, that the law wisely and peremptorily prohibits it."<sup>208</sup> "The rule which prevents the agent or trustee from acting for himself in a matter where his interest would conflict with his duty also prevents him from acting for another whose interest is adverse to that of the principal; and in all cases where, without the assent of the principal, the agent has assumed to act in such double capacity, the principal may avoid the transaction at his election. No question of its fairness or unfairness can be raised. The law holds it constructively fraudulent and voidable at the election of the principal."<sup>209</sup> As stated in another case, the rule which forbids an agent to act for parties adversely interested, being not merely

<sup>207</sup> *Commonwealth S. S. Co. v. American Shipbuilding Co.* (D. C.) 197 Fed. 780; *Litchfield v. Browne*, 70 Fed. 141, 17 C. C. A. 28; *Gross v. George W. Scott Mfg. Co.* (C. C.) 48 Fed. 35; *Daniel v. Brown* (C. C.) 33 Fed. 849; *O'Meara v. Lawrence*, 159 Iowa, 448, 141 N. W. 312; *Baltimore Sugar Refining Co. v. Campbell & Zell Co.*, 83 Md. 36, 34 Atl. 369; *Kuntz v. Tonnele*, 80 N. J. Eq. 373, 84 Atl. 624; *Yeoman v. Lasley*, 40 Ohio St. 190; *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189; *Ripley v. Jackson Zinc & Lead Co.*, 221 Fed. 209, 136 C. C. A. 619. But see *Hearn v. Schuchman*, 80 Misc. Rep. 311, 141 N. Y. Supp. 242.

<sup>208</sup> *Donovan v. Camplon*, 85 Fed. 71, 29 C. C. A. 30.

<sup>209</sup> *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 460, 32 Am. Rep. 380.

remedial of actual wrong, but preventive of the possibility of it, it may be invoked not only against the unfaithful agent in an action involving his commissions or other form of compensation, but also against the seller who employed the purchaser's agent to assist him in making the sale, as the foundation of a right in the purchaser to rescind the contract of sale upon discovery of the constructive fraud.<sup>210</sup>

These principles are well illustrated by a recent case in a federal court. A bill in equity was filed by a steamship company, alleging that it was organized by certain named persons as promoters; that such persons had previously procured from the defendant an option for a contract under which defendant was to build a steamship for a price stated therein; that the promoters represented that they had large experience in such matters, and that the option was very favorable as to price, and so on; that on securing subscribers to the stock they entered into a contract with defendant for building the vessel, and that complainant corporation, on its organization being effected, assumed the contract, received and paid for the vessel, partly in cash and partly by the issuance of bonds, and also paid the promoters for their services in procuring the contract and superintending the building of the vessel in its behalf; that in fact the contract was fraudulent, in that defendant, with knowledge of their purpose to organize a corporation to take over the contract, agreed to and did pay to the promoters a secret commission thereon. It was held that, on the facts alleged, the promoters, in the transactions with the defendant, acted as trustees and agents for complainant and its stockholders, and that the payment to them by defendant of a secret commission was in effect a bribery of its agent which vitiated the contract for fraud, and entitled complainant to its rescission in equity, and on surrender of the vessel to recover the consideration paid therefor.<sup>211</sup>

<sup>210</sup> *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189.

<sup>211</sup> *Commonwealth S. S. Co. v. American Shipbuilding Co.* (D. C.) 197 Fed. 780. See this case on appeal, 215 Fed. 296. And see *Yeiser v. United States Board & Paper Co.*, 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724.

The application of this rule is not affected by the fact that no active fraud or misrepresentation was practised by the agent.<sup>212</sup> Nor is it necessary that the principal shall have suffered any actual loss or damage, though the fact that he will be prejudiced is almost necessarily implied in a transaction of this sort. As stated in one of the cases, "no question of its fairness or unfairness can be raised; the law holds it constructively fraudulent."<sup>213</sup> Neither is it necessary to show that the agent entertained an actual wrongful intention or that he was corruptly influenced by the practices of the other party. "How far a fact of this kind may have influenced the agent is in its nature an intangible mental condition very largely, and could only be rationally judged of by what follows. It would probably never be in the power of the principal complaining of the transaction to affirmatively show what was the secret operation of such an influence on the mind of a treacherous representative. It is well settled, consequently, that the fact of the agent having been bribed or tempted to betray his principal is sufficient to entitle the principal to repudiate the transaction, and it is not necessary as a basis for relief for such principal to show the actual effect of the bribe or gift upon the agent. The ground on which the rule rests is much deeper and broader than a mere question of evidence, and takes into full account human nature. The agent is not allowed, by gift, commission, or other form of compensation or consideration, to assume an attitude in conflict with the very best interests of his principal. It is a relation which, on grounds of public policy, demands the utmost loyalty to the principal at all times."<sup>214</sup> And further, the right of a vendee of property to rescind because the vendor gave a secret commission to the vendee's agent is not affected by the fact that a part of the commission paid by the vendor to such agent was for services previously rendered by such agent to the vendor in prior transactions.<sup>215</sup>

<sup>212</sup> *Mastin v. Noble*, 157 Fed. 506, 85 C. C. A. 98.

<sup>213</sup> *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 460, 32 Am. Rep. 380.

<sup>214</sup> *Alger v. Anderson* (C. C.) 78 Fed. 729.

<sup>215</sup> *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189.



But the secret bribery or corruption of an agent does not make the resulting contract absolutely void, but only voidable at the election of the principal.<sup>216</sup> "The right to avoid the contract because the agent has a personal interest in the subject-matter adverse to that of the principal, or has assumed an incompatible duty, is one arising in equity for the principal's protection. He may avail himself of the right to avoid the contract, or he may waive it, at his option," and "if the principal, with full knowledge of all the facts affecting his rights, ratifies the act of the agent, the right to avoid the contract or transaction is gone."<sup>217</sup> Thus, in a case in New York, the purchasing agent of a company reported to his principal that a seller of goods such as the principal desired had made a proposition to him (the agent) to pay him a commission on goods which should be sold to the principal through his procurement or instrumentality. This was not only an attempt to corrupt the agent which would have vitiated the contract at common law, as we have seen, but it was also in violation of a penal statute of the state. Thereupon the principal directed the purchasing agent to buy some goods from the seller, "and see what he would do about it, to make a test case." Afterwards the principal made a purchase with knowledge of the offering of a commission to his agent. It was held that the purchaser was liable for the price of the goods, notwithstanding the offer and actual payment of a commission.<sup>218</sup>

But to bring the rule into operation, it is necessary that the agent should have played an active part in the transaction, and that his efforts should at least have contributed materially to the making of the contract. Thus, specific performance of a contract for the sale of realty will not be denied on the ground that the agent whom plaintiff had engaged to sell the property had wrongfully acted as agent

<sup>216</sup> *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189.

<sup>217</sup> *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450, 460, 461, 462, 32 Am. Rep. 380; *Gross v. George W. Scott Mfg. Co. (C. C.)* 59 Fed. 388.

<sup>218</sup> *Ballin v. Fourteenth Street Store*, 123 App. Div. 582, 108 N. Y. Supp. 26.



for both parties, where it appears that the agent had nothing more to do with the negotiation than merely to transmit the offer of the one party to the other.<sup>219</sup>

§ 35. **Intention to Deceive or Defraud.**—Actual fraud necessarily involves an intention to deceive or mislead, or at least an intention to do an act the necessary result of which will be the deception or misleading of the other party.<sup>220</sup> Fraud is a fact, but it originates in a mental state, and it requires the concurrence of a fraudulent intention and an act performed in the execution of that intention. Just as a sinister design upon the property or rights of another amounts to nothing in law if nothing is done in the execution of it, if it goes no further than a mere mental concept, so an act done honestly and with no purpose to deceive another to his injury does not constitute fraud in fact. Thus, for instance, where the evidence in an action to cancel a deed shows that the defendant's object in what he did was not to defraud the plaintiff, but, by obtaining a deed from him, to avoid the expense of foreclosing a mortgage held by a relative, and of a receivership, which would have been necessary, no relief will be granted.<sup>221</sup> So, in another case, an agent who had charge of certain property for an absent owner received instructions to sell it for a price of about \$5,000. The agent wished to purchase it himself, and reported to his principal that, subject to his approval, he had accepted an offer of \$4,500 net, and sent

<sup>219</sup> *Croghan v. Worthington Hardware Co.*, 115 Va. 497, 79 S. E. 1039.

<sup>220</sup> *Guy v. Blue*, 146 Ind. 629, 45 N. E. 1052; *Polhemus v. Polhemus*, 114 App. Div. 781, 100 N. Y. Supp. 263; *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349; *Kent County R. Co. v. Wilson*, 5 Houst. (Del.) 49, 56; *Hanson v. Edgerly*, 29 N. H. 343; *Sentman v. Gamble*, 69 Md. 293, 13 Atl. 58, 14 Atl. 673; *Gardner v. Heartt*, 3 Denio (N. Y.) 232; *Nichols v. Pinner*, 18 N. Y. 295; *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103; *Pauly Jail Building & Mfg. Co. v. Hemphill County*, 62 Fed. 698, 10 C. C. A. 595; *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386; *Enright v. Fellheimer*, 25 Misc. Rep. 664, 56 N. Y. Supp. 366; *Jolliffe v. Collins*, 21 Mo. 338; *Stratton v. Dudding*, 164 Mo. App. 22, 147 S. W. 516; *Summers v. Metropolitan Life Ins. Co.*, 90 Mo. App. 691; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Andalman v. Chicago & N. W. Ry. Co.*, 153 Ill. App. 169. And see, *infra*, § 108.

<sup>221</sup> *Brehm v. Gushal*, 31 Misc. Rep. 112, 64 N. Y. Supp. 927.

him a deed of the property with the grantee's name left blank. The owner executed the deed, returned it, and accepted the agent's check for \$4,500, which was the full value of the land. The agent did not understand himself to be in the owner's employment, and did not know that a selling agent's name could not be written in a deed as the grantee without the grantor's consent, and, intending no fraud, he entered into possession. It was held that ejectment could not be maintained against him on the ground of a fraudulent concealment.<sup>222</sup> So again, persons who receive money from an administrator in payment of supposed claims against the estate can be held guilty of a tort in receiving the money only in case of an actual fraudulent intent to appropriate money of the estate to a purpose which they know, or as reasonable men ought to know, is unlawful.<sup>223</sup> Further, the fact that the execution of a deed is in line with a purpose previously entertained by the grantor, and that its effect is simply to carry out an agreement previously made between the parties, goes far towards negating alleged fraud on the part of the grantee in securing its execution.<sup>224</sup> And on the other hand, the fact that the original contract between the parties was made without any fraudulent intention or design is immaterial when one of them afterwards repudiates it, and by fraud and collusion succeeds in cheating the other out of the rights which would have accrued to him under the contract.<sup>225</sup> Conversely, fraud cannot be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design, or purpose either in doing or not doing the acts complained of.<sup>226</sup> But it should be remarked in passing that the main rule above stated has been considerably modified by statutes in some of the states. Thus in Georgia, it is enacted that "fraud may exist by misrepresentation by either party, made with

<sup>222</sup> *Burke v. Bours*, 3 Cal. Unrep. Cas. 393, 26 Pac. 102.

<sup>223</sup> *Miles v. Pike Min. Co.*, 124 Wis. 278, 102 N. W. 555.

<sup>224</sup> *Brennan v. Zehner*, 97 Mich. 98, 56 N. W. 231.

<sup>225</sup> *Sayer v. Devore*, 99 Mo. 437, 13 S. W. 201.

<sup>226</sup> *Reiter v. Cumbach*, 1 Ind. App. 41, 27 N. E. 443.

design to deceive, or which does actually deceive, the other party,"<sup>227</sup> thus apparently making the result the important matter, and not the intention. So in California, the intent which is an element of the fraud is the intent to induce another to enter into a contract, and not the intent to deceive; so that, if a materially false statement is made, with knowledge of its falsity or without sufficient ground for believing it to be true, in order to induce another to buy an article, and which does so induce him to his prejudice, the seller cannot escape liability on the ground that he acted in good faith and without any actual intention to deceive.<sup>228</sup>

As to constructive fraud, or fraud in law, the rule is different. There may be fraud in law where no actual fraudulent intent is proved, but it is said that it exists only when the acts upon which it is based carry in themselves inevitable evidence of it, independently of the motive of the actor.<sup>229</sup> Thus, for example, where one who was the confidential adviser of a widow, and also the executor of her husband's will, purchased land with the proceeds of an insurance policy on the husband's life, and conveyed the same to the widow for life, with remainder to her children, she supposing that she was receiving a conveyance of the fee, such conveyance was held to be a constructive fraud on the widow, although the executor honestly believed, because of a want of business capacity in the widow, that such procedure was the best method of protecting the property.<sup>230</sup>

**§ 36. Effect of Fraud in Deceiving or Tricking Party.—**To be available as ground for the rescission of a contract or obligation, it is necessary that the fraud alleged to have been practised by one party upon the other should have been effective in deceiving or misleading him and also in inducing him to enter into the contract or assume the ob-

<sup>227</sup> Civ. Code Ga. 1910, § 4113. And see *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497.

<sup>228</sup> Civ. Code Cal., § 1572; *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

<sup>229</sup> *Delaney v. Valentine*, 154 N. Y. 692, 49 N. E. 65.

<sup>230</sup> *Lampman v. Lampman*, 118 Iowa, 140, 91 N. W. 1042. But compare *Horne v. Higgins*, 76 Miss. 813, 25 South. 489.

ligation.<sup>231</sup> To constitute fraud justifying the rescission of a contract, "it is essential that the means used should be successful in deceiving. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi.* If a contract is made under such circumstances, the inducement or motive for making it is, *ex concessis*, not the false or fraudulent representations, which are not believed, but some other independent motive. And even if the one party is unaware of the truth; yet if the artifice adopted by the other has not induced him to enter into the contract, that is to say, if the fraud is not *fraus dans locum contractui*, he will not be entitled to relief."<sup>232</sup> The materiality of the fraud as an inducement to the contract is not to be overlooked. It must be shown that the party alleged to have been defrauded would not have given his consent to the contract, or acted as he did, if it had not been for the fraud.<sup>233</sup> If he was not deceived, if he detected the attempted fraud, it may be presumed that his decision was in no way influenced by the artifice or falsehood which the other party endeavored to carry through. But if he really was deceived or tricked, it is still necessary to show that his consent would not have been given if his eyes had been opened.

These principles have been embodied in the legislation of several of the states. Thus, in Louisiana, it is said that "error," that is, mistake or deception, "is an essential part of the definition of fraud as applied to contracts; an artifice that cannot deceive can have no effect in influencing the consent and cannot injure the validity of the contract," and "the error must be on a material part of the contract, that is to say, such part as may reasonably be presumed to have

<sup>231</sup> *Studer v. Bleistein*, 115 N. Y. 316, 22 N. E. 243, 5 L. R. A. 702; *Stewart v. Fleming*, 105 Ark. 37, 150 S. W. 128; *Monad Engineering Co. v. Stewart* (Del. Super.) 2 Boyce, 35, 78 Atl. 598; *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37.

<sup>232</sup> 1 Benj. Sales, § 637. And see *Gregory v. Schoenell*, 55 Ind. 101.

<sup>233</sup> *Wann v. Scullin*, 210 Mo. 429, 109 S. W. 688.

influenced the party making it, but it need not be the principal cause of the contract, as it must be in the case of simple error without artifice," that is, what the common law knows as "mistake" without fraud.<sup>284</sup> So, in Georgia, "fraud may exist by misrepresentation by either party, made with design to deceive, or which does actually deceive, the other party. A misrepresentation not acted on is not ground for annulling a contract."<sup>285</sup> So, by the codes of several other states, "consent is deemed to have been obtained through one of the causes mentioned [duress, menace, fraud, undue influence, or mistake] only when it would not have been given had such cause not existed."<sup>286</sup>

But to impeach a transaction for fraud practised by one party upon the other, it is not necessary that the fraud complained of should have been the sole cause or inducement to the making of the contract, but it is sufficient if it forms one factor in the transaction.<sup>287</sup> Thus, for instance, in an action for damages for personal injuries, which involves the setting aside of a release executed by the plaintiff soon after the accident, if it is shown that the extent of his injuries was misrepresented to him, and that this fact, at least to some extent, induced him to sign the release, the defendant cannot escape liability by showing that the plaintiff, at the time, was in need of money and anxious to get home to his family, and that these considerations also influenced him in accepting the settlement offered.<sup>288</sup>

**§ 37. Resulting Loss or Damage to Defrauded Party.—**  
As a general rule, a fraud which causes no injury is not

<sup>284</sup> Rev. Civ. Code La., § 1847.

<sup>285</sup> Civ. Code Ga. 1910, § 4113.

<sup>286</sup> Civ. Code Cal., § 1568; Rev. Civ. Code Mont., § 4974; Rev. Civ. Code N. Dak., § 5289; Rev. Civ. Code S. Dak., § 1197; Rev. Laws Okl. 1910, § 899.

<sup>287</sup> *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *In re Gany* (D. C.) 103 Fed. 930; *Rice v. Gilbreath*, 119 Ala. 424, 24 South. 421; *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529; *Safford v. Grout*, 120 Mass. 20; *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799; *American Hardwood Lumber Co. v. Dent*, 121 Mo. App. 108, 98 S. W. 814; *Burnham v. Ellmore*, 66 Mo. App. 617; *State v. Merry*, 20 N. D. 337, 127 N. W. 83; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884.

<sup>288</sup> *Texas & P. Ry. Co. v. Jowers* (Tex. Civ. App.) 110 S. W. 946.

legally cognizable; and it is an essential part of the definition of fraud, as a cause for the intervention of equity, or for a party to take steps to rescind a contract or other obligation into which he has entered, that it should have resulted, or that it will result, in some loss, damage, detriment, or injury to him.<sup>239</sup> Neither courts of law nor courts of equity exercise their powers for the purpose of enforcing moral obligations or correcting unconscientious acts which are not followed by any loss or damage; fraud and injury must concur to furnish a ground of judicial action.<sup>240</sup> In the case of executed contracts, the loss, if any, will naturally have occurred before steps are taken to rescind. But in the case of executory contracts, the rule does not mean that the party complaining should have sustained actual loss at the moment of rescinding or filing his bill for rescission, but it is enough to show that such will be the inevitable result if the contract is completed according to its terms. In the state of Louisiana, this has been incorporat-

<sup>239</sup> *United States v. Conklin* (C. C.) 169 Fed. 177; *Hodges v. Coleman*, 76 Ala. 103; *United Real Estate & Trust Co. v. Barnes*, 159 Cal. 242, 113 Pac. 167; *Woodson v. Winchester*, 16 Cal. App. 472, 117 Pac. 565; *Morrison v. Martin*, 84 Conn. 628, 80 Atl. 716; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311; *Sleeking v. Litzler*, 31 Ind. 13; *Anderson v. Evansville Brewing Ass'n*, 49 Ind. App. 403, 97 N. E. 445; *Donaldson v. Donaldson*, 249 Mo. 228, 155 S. W. 791; *Kuper v. Snethen*, 96 Neb. 34, 146 N. W. 991; *Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59, 87 N. W. 1050; *Marquis v. Tri-State Land Co.*, 77 Neb. 353, 109 N. W. 397; *Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 61; *Thouron v. Skirvin*, 57 Tex. Civ. App. 105, 122 S. W. 55; *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116; *Noble v. Libby*, 144 Wis. 632, 129 N. W. 791; *Alsmeler v. Adams* (Ind. App.) 105 N. E. 1033; *Van Vliet Fletcher Automobile Co. v. Crowell* (Iowa) 149 N. W. 861; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Merlau v. Kalamazoo Circuit Judge*, 180 Mich. 393, 147 N. W. 503; *Stacey v. Robinson*, 184 Mo. App. 54, 168 S. W. 261; *Horne v. John A. Hertel Co.*, 184 Mo. App. 725, 171 S. W. 598; *Pickett v. Wren*, 187 Mo. App. 83, 174 S. W. 156; *Dunn & McCarthy v. Bishop* (R. I.) 90 Atl. 1073. Compare *Hall v. Santangelo*, 178 Ala. 447, 60 South. 168. A person who through misrepresentations is induced to make an expensive investigation of certain machinery, but who does not purchase it, may recover for the injuries sustained by reason of such misrepresentations. *Williams Patent Crusher & Pulverizer Co. v. Lyth Tile Co.* (Sup.) 150 N. Y. Supp. 6.

<sup>240</sup> *Galford v. Eastman*, 242 Ill. 41, 89 N. E. 783.

ed in the Code,<sup>241</sup> but it would probably be recognized everywhere as a sound principle of equity jurisprudence.

To illustrate these principles,—concealment of a material fact does not necessarily invalidate a mortgage if the other party was in no way injured thereby.<sup>242</sup> And where one, induced to part with land by fraud, nevertheless received a fair price therefor and a price equivalent to that given for similar lands in the vicinity, equity will not set aside the sale.<sup>243</sup> So the government cannot set aside a patent for lieu land for fraud in a conveyance of land exchanged for it, if unable to show damage.<sup>244</sup> Again, a widow executed an instrument releasing her interest in the estate of her deceased husband, whose will made no provision for her, and subsequently a dispute arose between her and the beneficiaries under the will, and for a consideration she executed a subsequent instrument releasing her claim to the estate. It was held that she could not maintain an action for damages for fraud in inducing the execution of the subsequent instrument, because, on account of the existence of the first instrument, she could not show any damages.<sup>245</sup> On the same principle, a person cannot recover damages for having been fraudulently induced to execute a release of a cause of action for personal injuries, because, if the release was fraudulently procured, it is void, and the plaintiff was not damaged.<sup>246</sup> And since, to create a liability against a defendant for depriving plaintiff of a legacy through fraud in inducing the testator to execute an invalid codicil, there must be not only a wrong inflicted by the defendant, but also damage to the plaintiff resulting directly therefrom, the plaintiff must show facts excluding the possibility that

<sup>241</sup> Rev. Civ. Code La., § 1847. Where a note procured by fraud is negotiated to an innocent purchaser, the maker is damaged so as to be entitled to recover for the fraud, though the note is not due. *Hoffman v. Toft*, 70 Or. 488, 142 Pac. 365, 52 L. R. A. (N. S.) 944.

<sup>242</sup> *Sheridan v. Naton*, 159 Mo. 27, 59 S. W. 972.

<sup>243</sup> *Storthz v. Arnold*, 74 Ark. 68, 84 S. W. 1036.

<sup>244</sup> *United States v. Conklin* (C. C.) 169 Fed. 177.

<sup>245</sup> *Anderson v. Smitley*, 141 App. Div. 421, 126 N. Y. Supp. 25.

<sup>246</sup> *Lomax v. Southwest Missouri Electric Ry. Co.*, 106 Mo. App. 551, 81 S. W. 225.



the testator changed his purpose respecting the legacy before his death.<sup>247</sup> Again, where one of two partners secured purchasers for his partner's interest in the firm by falsifying the books so as to conceal some of the firm debts, but the purchasers assumed only the debts of the firm as they appeared on the books at the time of the sale, they were not injured by the fraud and therefore could not rescind.<sup>248</sup>

There is, however, one well-recognized exception to the general rule above stated, which relates to sales of property. A purchaser of personal property is entitled to receive the identical property bought, and if the vendor, by fraud or trick, palms off on him, or induces him to accept, a substituted article or something not contemplated by his contract, the purchaser may rescind the sale and recover what he has paid, without showing any pecuniary damage, or even though the substituted article is worth full as much as the one intended, for "the purchaser is entitled to the bargain which he supposed and was led to believe he was getting, and is not to be put off with any other, however good."<sup>249</sup> So also as to realty. A person cannot, with intention to mislead a purchaser by deceiving him concerning facts as to which he is in the dark, sell him land for one purpose, and then, in a suit in equity, brought to annul the transaction by reason of such fraud, defend on the ground that, while he knowingly and willfully deceived the purchaser in the manner claimed, the grantee will lose nothing thereby if he will avail himself of the land for some other or different purpose designated by the grantor.<sup>250</sup>

If damage is shown, the extent of the injury occasioned by the fraud will not be inquired into in a suit to rescind the contract.<sup>251</sup> And the injury need not be accurately

<sup>247</sup> *Lewis v. Corbin*, 195 Mass. 520, 81 N. E. 248, 122 Am. St. Rep. 261.

<sup>248</sup> *McCarrell v. Hayes*, 186 Ala. 323, 65 South. 62.

<sup>249</sup> *Mather v. Barnes* (C. C.) 146 Fed. 1000; *Jakway v. Proudfit*, 76 Neb. 62, 106 N. W. 1039, 109 N. W. 388, 14 Ann. Cas. 258; *Fuller v. Chenault*, 157 Ala. 46, 47 South. 197; *Maxfield v. Jones*, 106 Ark. 346, 153 S. W. 584.

<sup>250</sup> *Steen v. Weisten*, 51 Or. 473, 94 Pac. 834.

<sup>251</sup> *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.



measurable in money, but it is sufficient if it is of a pecuniary nature.<sup>252</sup> And an allegation in a petition to cancel a conveyance of real property, that in reliance on the fraudulent representations the plaintiff parted with title to the land, is a sufficient plea that he was damaged by the fraud.<sup>253</sup> So, in a suit to set aside a deed for fraud, the fact that plaintiff was injured sufficiently appears from a finding that the price paid was grossly inadequate.<sup>254</sup> Another point, very important to be noticed in this connection, is that it is not necessary to show that the defendant against whom relief is sought had any interest of his own to serve in the fraud which he practised, or that he himself derived any benefit or advantage from its results, provided that loss or injury to the plaintiff is shown.<sup>255</sup> Thus, a defendant who was an active participant in a scheme by which the complainants, with whom he was in close and confidential business relations, were fraudulently induced to make a transfer of their property, cannot escape liability to make restitution on a cancellation of the transfer, on the ground that he did not himself profit by the fraud.<sup>256</sup> So, in an action for damages for deceit in placing on the market valueless notes in pursuance of a scheme to defraud, it is immaterial to defendant's liability, that he did not obtain any of the plaintiff's money, as he is liable, not because of benefit to himself, but for the wrongful act and the consequent injury to the plaintiff.<sup>257</sup> So, a vendor who gives a false receipt, purporting to be in payment of half the price of land, to enable the vendee, through it, to sell the land for double the actual price, is a joint wrongdoer with the vendee, and is responsible for the consequences of the fraud, though personally he receives no benefit from it.<sup>258</sup>

<sup>252</sup> *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011.

<sup>253</sup> *Rihner v. Jacobs*, 79 Neb. 742, 113 N. W. 220.

<sup>254</sup> *Hick v. Thomas*, 90 Cal. 289, 27 Pac. 208, 376.

<sup>255</sup> *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Page v. Bent*, 2 Metc. (Mass.) 371. Compare *Kenah v. Huston*, 15 Wash. 275, 46 Pac. 236. See *Bingham v. Fish*, 86 N. J. Law, 316, 90 Atl. 1106.

<sup>256</sup> *Goldsmith v. Koopman* (C. C.) 140 Fed. 616.

<sup>257</sup> *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299.

<sup>258</sup> *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722.

Finally, a party cannot legally be said to have been injured by a fraud which does not touch him or in any way affect his rights, though it may work wrong to some other person concerned in the transaction. Thus, the fact that a committee appointed by the owners of certain lands to sell the same, stipulate with the purchaser that a large part of the purchase money shall be paid to them, is no ground for a rescission of the contract by such purchaser, since, if any fraud is committed thereby, it is not a fraud upon him, but upon the rights of the other owners.<sup>259</sup> So the fact that persons acting as bankers for another stop payment of his checks, with intent to cheat the owners of property sold to him, and appropriate the property to their own use, does not constitute such fraud as would give the seller a cause of action against them, the buyer having bought the property in good faith and with intent to pay for it.<sup>260</sup>

§ 38. **Fraud Practised on Both Sides.**—Where there have been false and fraudulent representations or deceit practised on both sides, both parties endeavoring to mislead and cheat each other, the inequitable conduct of the one party may be set off against that of the other, and relief denied in equity.<sup>261</sup> This principle is sometimes expressed in the maxim "*Fraus non est fallere fallentem*," meaning that it is not fraud to deceive a deceiver, that is, that a party to a contract who cheated and deceived the other cannot raise the cry of fraud because he himself was also made the victim of a deceit in the same transaction. But it is no defense to an action to cancel a deed procured by fraud and undue influence that the plaintiff, in making the deed to the defendant, intended to defraud a third person.<sup>262</sup> In other words, to bring into operation the rule for setting off fraud against fraud, the frauds must have been mutual. An in-

<sup>259</sup> *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931. And see *Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 161.

<sup>260</sup> *Theusen v. Bryan*, 113 Iowa, 496, 85 N. W. 802.

<sup>261</sup> *Greenfield v. Edwards*, 11 Law T. (N. S.) 663; *Supreme Council Catholic Knights v. Beggs*, 110 Ill. App. 139; *Maurice v. Devol*, 23 W. Va. 247. Contra, *Blair v. Balrd*, 43 Tex. Civ. App. 134, 94 S. W. 116.

<sup>262</sup> *Gatje v. Armstrong*, 145 Cal. 370, 78 Pac. 872.

teresting illustration of this principle is found in a case in Michigan, where the vendor of land was a speculator and dealer in lands containing deposits of iron ore. He had been prospecting on the lands in question and had discovered iron ore and for that reason bought the property. He offered it for sale to certain scientific men, and negotiations were opened. The vendees visited the lands themselves, and made the discovery not only that the property contained iron ore, but also that it was of a peculiarly high grade and of great value. They pretended that they wished to purchase the lands only for the sake of the timber on them, but the vendor replied that the property was also valuable on account of the iron ore, and it was eventually sold for a price much greater than the timber was worth, but much less than the actual value of the ore considering its grade. It was held that the vendor had no ground to set aside the sale. The court said: "On both sides they were dealers and speculators in iron lands; there was no relation of confidence between him and them; they were dealing with each other at arms' length; and the whole course of the correspondence shows that each party expected the other to obtain his own information in his own way, and to decide as to the value at his own risk, and that neither was acting in reliance upon the statements of the other as to the value of the lands."<sup>263</sup>

**§ 39. Duty of Care and Prudence to Detect Fraud.**—It is the duty of a person negotiating with reference to the formation of a contract, the execution of a conveyance, or any other business transaction, to be on his guard against any attempt to trick or cheat him, and to exercise proper care and vigilance to avoid any fraud or imposition, and if he fails in this, and is defrauded and injured, equity will not ordinarily grant him any relief.<sup>264</sup> As it is sometimes

<sup>263</sup> *Williams v. Spurr*, 24 Mich. 335.

<sup>264</sup> *Great Western Mfg. Co. v. Adams*, 176 Fed. 325, 99 C. C. A. 615; *Arkadelphia Lumber Co. v. Thornton*, 83 Ark. 403, 104 S. W. 169; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Pool v. Tucker*, 36 Ill. App. 377; *Stedman v. Boone*, 49 Ind. 469; *Williamson v. Hiltner*, 79 Ind. 233; *Wood v. Waek*, 31 Ind. App. 252, 67 N. E. 562; *Mansfield v. Watson*, 2 Iowa, 111. Compare *White Sewing*

stated, a person who engages in a business transaction with his eyes deliberately closed cannot complain of having been overreached for the lack of information which he might have obtained if he had kept his eyes open.<sup>265</sup> Thus, in an instructive case in Indiana, it appeared that the plaintiff, a widow, was requested by the defendant to sign and acknowledge a paper which he presented to her, stating that it was a receipt for money which he had advanced to her. She accepted his assurance as to its nature and complied with his request. In reality the paper was an assignment to defendant of a policy of insurance on the life of her deceased husband. The plaintiff's suit was to cancel this assignment as having been procured by fraud. She had not known that her husband was carrying any life insurance, and alleged that defendant concealed this fact from her, but did not allege any affirmative acts of concealment or that he knew she was unaware of the existence of the policy. No reason was given for her failure to read the assignment, which was indorsed on the policy, nor did the complaint allege that she did not know that an acknowledgment to a mere receipt for money was unusual. It was held that the complaint did not show a cause of action, as the deception was not the result of defendant's artifice, but of the plaintiff's own negligence.<sup>266</sup> So, the fact that a minor son, to induce his father to convey land to his mother, fraudulently agreed to and did convey his land to his father, with intention to repudiate the conveyance, as he afterwards did, cannot be relied on by the father as ground for setting aside the conveyance to his wife, as he must be presumed to have known his son's age and that he could not make a binding conveyance.<sup>267</sup> More especially if a person has his suspi-

*Mach. Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Van Metre v. Nunn*, 116 Minn. 444, 133 N. W. 1012. "If the party by reasonable diligence could have had knowledge of the truth, equity will not relieve; nor will the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation nor other fraudulent act." Civ. Code Ga. 1910, § 4581.

<sup>265</sup> *Exchange Bank v. E. B. Williams & Co.*, 120 La. 901, 45 South. 935.

<sup>266</sup> *Miller v. Powers*, 119 Ind. 79, 21 N. E. 455, 4 L. R. A. 483.

<sup>267</sup> *Anderson v. Anderson*, 122 Wis. 480, 100 N. W. 829.

cions aroused, or becomes cognizant of circumstances which strongly suggest an investigation, he cannot safely neglect to follow up the clue, but will be held responsible for such information as he might have obtained.<sup>268</sup> But these rules do not apply where the subject-matter of the contract is not at hand, and the facts are within the knowledge of the one party, but cannot be ascertained by the other without trouble and expense,<sup>269</sup> or are such as require the exercise of special skill, technical knowledge, or extraordinary care to ascertain and judge of them, which the party does not possess or cannot exercise.<sup>270</sup>

But while the general rule, as above stated, is not controverted, there has been much difference of opinion among the authorities as to the measure or degree of care to be required of a person in safeguarding his own interests against fraud and imposition, before he can apply to equity for relief. Some of the cases have held the complaining party to a high degree of care and vigilance. Others have not hesitated to give redress where his negligence and folly were gross and apparent. Perhaps the majority have applied the standard of "ordinary care and prudence" or have demanded to be satisfied that the conduct of the plaintiff was such as would befit a man of "average intelligence" or of "ordinary prudence." But there is an increasing perception of the fact that this is, after all, but a rough-and-ready principle, and that a rule which would be fairly applicable as between two business men of equal sagacity would be ludicrously unjust if applied as between a shrewd knave and an inexperienced woman, or between a sharper and a fool. And the modern decisions go far towards establishing what we may call the doctrine of "comparative intelligence," that is to say, that the question must be determined in the light of the special circumstances of each particular case, and that, to arrive at any just conclusion in a case where it is claimed that the complaining party should

<sup>268</sup> *Steele v. Lawyer*, 47 Wash. 266, 91 Pac. 958; *Veney v. Furth*, 171 Mo. App. 678, 154 S. W. 793.

<sup>269</sup> *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172.

<sup>270</sup> *Sanford & Brooks Co. v. Columbia Dredging Co.*, 177 Fed. 878, 101 C. C. A. 92.

be deprived of any relief because of his own negligence or want of care, it is necessary to take into account the mental, physical, and pecuniary condition of each of the parties at the time of the contract, and to weigh their comparative intelligence, with respect to the successful practice of fraud or its successful detection, the one against the other, taking into account such elements as shrewdness or simplicity, caution or improvidence, intelligence or stupidity, experience or the lack of it, suspicion or credulity, education or ignorance, and also to consider the temporary condition of the party's mental faculties, as being at their brightest on the one hand, or, on the other hand, as being at the time obscured or weakened from any cause.<sup>271</sup>

§ 40. **Rule as to Persons Occupying Positions of Trust or Confidence.**—When one of the parties to a contract or business transaction occupies a confidential or fiduciary relation towards the other, they do not deal at arms' length, nor are they required to be on their guard against each other for the detection or prevention of fraud. On the contrary, the person occupying the subordinate or dependent position has the right to rely implicitly upon the integrity and good faith of the other, and upon the information and advice which he may give him, while the party who is in the superior or dominant position is bound to exercise the utmost good faith, to state the truth in all that he says, to disclose all material information, and to refrain from taking any personal advantage of the influence or authority which he may possess. So that, if any contract or dealing between them results in an unfair or inequitable advantage to the dominant party, it will be set aside in equity, without proof of any actual fraud or sinister purpose on his part, and notwithstanding the fact that the injured party might have protected himself if he had been on the alert and had exercised care and prudence.<sup>272</sup> To state the rule

<sup>271</sup> See *King v. Cohorn*, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455; *Jackson v. Collins*, 39 Mich. 557; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799; *Kendall v. Wilson*, 41 Vt. 567. And see, *infra*, § 123.

<sup>272</sup> *Rogers v. Brightman*, 189 Ala. 228, 66 South. 71; *Lee v. Lee*, 258 Mo. 599, 167 S. W. 1030; *Payne v. Payne*, 12 Cal. App. 251, 107

somewhat differently, where two persons stand in a relation such that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and the confidence is abused, or the influence exerted to obtain an advantage at the expense of the confiding person, the person so availing himself of his position cannot retain the advantage, although the transaction could not have been impeached if no such relation had existed between them.<sup>273</sup> The rule of *caveat emptor* does not apply to a transaction between parties so situated,<sup>274</sup> and in an action between such parties, it is no defense to bring home to the defrauded party knowledge of facts which would have sufficed to cause an ordinarily prudent person to make inquiries, for in such conditions nothing short of actual knowledge will do.<sup>275</sup> And while it is true that the mere existence of a fiduciary relation between contracting parties will not render the contract void or even voidable, where it is open, honest, and fair,<sup>276</sup> yet a court of equity, when complaint is made to it, will subject all such dealings to a very close and jealous scrutiny.<sup>277</sup> Further, fraud may be predicated upon the suppression of a material fact, and when a confidential relation exists, it is the duty of the person in whom

Pac. 148; *Mackall v. Mackall*, 3 Mackey (D. C.) 286; *Beach v. Wilton*, 244 Ill. 413, 91 N. E. 492; *Baker v. Wheeler*, 149 Ill. App. 579; *Peter v. Wright*, 6 Ind. 183; *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422; *Reck v. Reck*, 110 Md. 497, 73 Atl. 144; *Thiede v. Startzman*, 113 Md. 278, 77 Atl. 666; *Seeley v. Price*, 14 Mich. 541; *Naeseth v. Hommedal*, 109 Minn. 153, 123 N. W. 287; *Cohen v. Ellis*, 16 Abb. New Cas. (N. Y.) 320; *Smith v. Firth*, 53 App. Div. 369, 65 N. Y. Supp. 1096; *Fjone v. Fjone*, 16 N. D. 100, 112 N. W. 70; *Johnson v. Savage*, 50 Or. 294, 91 Pac. 1082; *Matthael v. Pownall*, 235 Pa. 460, 84 Atl. 444. As to fraudulent misrepresentations of facts by party occupying position of trust or confidence, and duty to investigate, see, *infra*, § 119.

<sup>273</sup> *Hawkes v. Lackey*, 207 Mass. 424, 93 N. E. 828; *Martin v. Baker*, 135 Mo. 495, 36 S. W. 369.

<sup>274</sup> *Manheim v. Woods*, 213 Mass. 537, 100 N. E. 747.

<sup>275</sup> *McDonough v. Williams*, 86 Ark. 600, 112 S. W. 164.

<sup>276</sup> *Crosby v. Dorward*, 248 Ill. 471, 94 N. E. 78, 140 Am. St. Rep. 230.

<sup>277</sup> *Payne v. Payne*, 12 Cal. App. 251, 107 Pac. 148; *Fjone v. Fjone*, 16 N. D. 100, 112 N. W. 70; *Tindal v. Sublett*, 82 S. C. 199, 63 S. E. 960.



confidence is reposed to disclose fully and fairly every material matter in his knowledge of which he knows the other party is ignorant, failing of which he is guilty of fraud.<sup>278</sup> Thus, where a person occupying a position of trust towards another possesses exclusive information concerning the rights of that other to property, and makes a contract with him for the property without disclosing his exclusive knowledge, the contract may be avoided.<sup>279</sup>

In fact, many of the cases go to the length of holding that any bargain or transaction by which one holding a fiduciary or confidential relation to another gains an advantage for himself, or which results in detriment to the other, is not only inequitable but presumptively fraudulent, and that it will be set aside or annulled unless the person benefited by it shall sustain the burden of proving, by clear and satisfactory evidence, that he did not abuse or betray his trust, that he acted in entire good faith, that the party worsted in the transaction fully understood his position and acted deliberately, and that there was an adequate consideration given.<sup>280</sup> But the jealous care of the law for the protection of persons in dependent or subordinate positions is sometimes carried even beyond this point. Some of the authorities (particularly in the case of gifts and voluntary trusts) hold that it is additionally necessary for the person seeking to sustain the transaction to show that the donor or grantor had the benefit of competent independent advice;<sup>281</sup> that is, as explained in one of the cases, disinterested advice on

<sup>278</sup> *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Beam v. Macomber*, 33 Mich. 127; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

<sup>279</sup> *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48.

<sup>280</sup> *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345; *Roberts v. Welmer*, 130 Ill. App. 297 (affirmed, 227 Ill. 138, 81 N. E. 40); *Thomas v. Whitney*, 83 Ill. App. 247 (affirmed, 186 Ill. 225, 57 N. E. 808); *Curtis v. Armagast*, 158 Iowa, 507, 138 N. W. 873; *Tindal v. Sublett*, 82 S. C. 199, 63 S. E. 960; *Peterson v. Budge*, 35 Utah, 596, 102 Pac. 211; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000. It is said that, where a confidential relation exists between the parties, a presumption of fraud arises more readily in the case of a gift than in the case of a contract. *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23.

<sup>281</sup> *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *Chanfrau v. Alexander* (C. C.) 185 Fed. 537; *Whitridge v. Whitridge*, 76 Md. 54,



the subject given in private, by some one of the party's own selection, and when not surrounded with dominant influences favoring the contract or transfer.<sup>282</sup> Thus, it is said that proper independent advice to a parent who is infirm or aged, as to a voluntary conveyance to his child, means that the donor had the benefit of conferring fully and privately on the subject of the intended gift with a person who was not only competent to inform him correctly as to its legal effect, but was so disassociated from the interests of the donee as to be able to advise him impartially and confidentially as to the consequences to the donor of his proposed benefaction.<sup>283</sup> But the principle as to the necessity of persons seeking independent advice before making dispositions of property to persons occupying positions of trust or confidence towards them applies only in cases where these parties are seeking to obtain some benefit or advantage for themselves. If they are not seeking such advantage, and the conveyance is not for their benefit or at their solicitation, but is made to them in trust for a benevolent or charitable use, it will be sufficient that the grantor had an opportunity to obtain independent advice, and that he was not in any way prevented from doing so, and that he fully comprehended what he was doing, and that it was his own voluntary act.<sup>284</sup>

**§ 41. Same; What Constitutes Fiduciary or Confidential Relation.**—Within the meaning of the rules under consideration, typical cases of fiduciary or confidential relations are seen in the instances of trustee and cestui que trust, attorney and client, principal and agent, guardian and ward, and the like. The principle has been generalized by saying that a fiduciary relation is any relation existing between parties to a transaction whereby one of them is in duty bound to act with the utmost good faith for the benefit

24 Atl. 645; *Russell's Appeal*, 75 Pa. 269; *Riddle v. Cutter*, 49 Iowa, 547; *Kleeman v. Peltzer*, 17 Neb. 381, 22 N. W. 793.

<sup>282</sup> *Nobles v. Hutton*, 7 Cal. App. 14, 93 Pac. 289.

<sup>283</sup> *Post v. Hagan*, 71 N. J. Eq. 234, 65 Atl. 1026, 124 Am. St. Rep. 997.

<sup>284</sup> *Bowdoin College v. Merritt (C. C.)* 75 Fed. 480.

of the other,<sup>285</sup> or that a person is said to stand in a fiduciary relation to another, when he has rights and powers which he is bound to exercise for the benefit of that other person.<sup>286</sup> But the rule which presumes fraud from the gaining of an inequitable advantage in such cases is by no means limited to instances of strict or technical trusts. On the contrary, it extends to every case where there is confidence justly reposed on the one side, and a resulting influence, ascendancy, or superiority on the other side.<sup>287</sup> But mere friendship between the parties does not justify the one in trusting the other implicitly or in assuming that the latter is not consulting his own interests in any business transaction between them,<sup>288</sup> although the friendly relations of the parties may be considered, in connection with other facts and circumstances, in determining whether fraud was practised.<sup>289</sup> And the fiduciary position must be alleged and shown. Equity will not presume a relation of trust and confidence in order to exercise its jurisdiction to relieve against fraud.<sup>290</sup> Further, the fact that a fiduciary relation once existed between the parties cannot be relied on as ground for avoiding a transaction between them, after it has been definitely terminated, where the new transaction is entered into with full knowledge and understanding of the facts, and uninfluenced by the former relation.<sup>291</sup>

**§ 42. Same; Principal and Agent.**—The relation of principal and agent is one of trust and confidence, within the meaning of the rule under consideration. There is nothing to prevent them from contracting together. But in any business dealing between them there must be complete

<sup>285</sup> *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

<sup>286</sup> *Ryan v. Ryan*, 174 Mo. 279, 73 S. W. 494.

<sup>287</sup> *Boykin v. Franklin Life Ins. Co.*, 14 Ga. App. 666, 82 S. E. 60; *In re Spann (Okl.)* 152 Pac. 68; *Ehrich v. Brunshwiler*, 241 Ill. 592, 89 N. E. 799; *Bingham v. Sheldon*, 101 App. Div. 48, 91 N. Y. Supp. 917; *Cannon v. Gilmer*, 135 Ala. 302, 33 South. 659. The relation of teacher and pupil is not such as to justify the latter in relying implicitly upon the former's statements in a business transaction. *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40.

<sup>288</sup> *Bosley v. Monahan*, 137 Iowa, 650, 112 N. W. 1102.

<sup>289</sup> *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183.

<sup>290</sup> *Todd v. Pratt*, 149 App. Div. 459, 133 N. Y. Supp. 949.

<sup>291</sup> *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

good faith, no exercise by the agent of the influence which his position gives him, no concealment of any material fact from the principal nor misrepresentation of any fact to him, and no advantage gained by the agent which it would be inequitable for him to retain. Further, no actual fraudulent purpose on the part of the agent need be proved, and the principal is not chargeable with negligence in relying on the statements and representations of the agent. If the transaction is not characterized by the extreme fairness and good faith which these requirements imply, it may be set aside in equity at the instance of the injured principal.<sup>292</sup> Thus, if an agent authorized to sell land belonging to his principal discovers facts which make it more valuable than had been supposed, it is his duty to make a full and prompt disclosure of the circumstances to the principal, and if he omits this duty, and so effects a sale of the land below its real value, and makes a profit out of the transaction, either by receiving a bonus from the purchaser or by becoming a joint purchaser himself, it is a fraud in law which will justify setting aside the sale.<sup>293</sup> And the same rule applies where an agent induces his principal to purchase various lands at excessive prices, himself benefitting by the transactions, either in the way of commissions or otherwise.<sup>294</sup> So, where defendant, who acted as plaintiff's agent in making an investment for her, falsely represented that the mortgage taken as security was a first mortgage, the plaintiff was held justified in relying on defendant's representations and not guilty of negligence in failing to resort to the records to ascertain their falsity.<sup>295</sup> And where an attorney in

<sup>292</sup> *Hayward v. McDonald*, 192 Fed. 890, 113 C. C. A. 368; *Tausig v. Hart*, 58 N. Y. 425; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 444; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Todd v. Grove*, 33 Md. 191; *McHarry v. Irvin's Ex'r*, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800; *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747; *German Savings & Loan Soc. v. De Lashmutt (C. C.)* 83 Fed. 33; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621; *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 649.

<sup>293</sup> *Keith v. Kellam (C. C.)* 35 Fed. 243; *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808.

<sup>294</sup> *Somervail v. McDermott*, 116 Wis. 504, 93 N. W. 553.

<sup>295</sup> *Faust v. Hosford*, 119 Iowa, 97, 93 N. W. 58.

fact induced the wife of his principal to join in a deed, on the false statement that it was at the request of her husband, the attorney knowing at the time that the husband was dead, the deed was held void as to the wife.<sup>296</sup>

§ 43. **Same; Attorney and Client.**—The relation of attorney and client is likewise one which requires the exercise of the utmost good faith and integrity. Any transaction or dealing between them will be closely scrutinized by the courts, and the attorney will not be allowed to retain any unconscientious advantage which he may have gained, even though he was guilty of no actual fraud. It is necessary, in fact, for him to show, in order to defend his position, that there was no fraud or mistake, no undue influence or bad advice on his part, no concealment or misrepresentation, and no inequitable advantage taken of his dominating position.<sup>297</sup> An attorney who bargains with his client in a matter of advantage to himself must, if the transaction is afterwards questioned, show that it was fairly conducted, and that he discharged his duties to his client not only by refraining from all misrepresentation and concealment, but by diligence to see that the client was fully informed of the nature of the transaction and of his own rights and interests, either by independent advice or else by such advice from the attorney himself as he would have given if he had been a stranger to the transaction.<sup>298</sup> These rules are applicable with perhaps peculiar severity where the attorney buys property from his client or sells to him. While a contract by which an attorney purchases an interest of his

<sup>296</sup> *Green v. Tuttle*, 5 Ariz. 179, 48 Pac. 1009.

<sup>297</sup> *Carlock v. Carlock*, 249 Ill. 330, 94 N. E. 507; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90; *Jennings v. McConnel*, 17 Ill. 148; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *Mills v. Mills*, 26 Conn. 213; *Howell v. Ransom*, 11 Paige (N. Y.) 538; *Eysamen v. Nelson*, 79 Misc. Rep. 304, 140 N. Y. Supp. 183; *Savery v. King*, 5 H. L. Cas. 655; *McPherson v. Watt*, L. R. 3 App. Cas. 254; *Harris v. Tremenbere*, 15 Ves. 84.

<sup>298</sup> *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831; *United States v. Coffin* (C. C.) 83 Fed. 337; *Barrett v. Ball*, 101 Mo. App. 288, 73 S. W. 865; *Goldberg v. Goldstein*, 87 App. Div. 516, 84 N. Y. Supp. 782; *In re Holland*, 110 App. Div. 799, 97 N. Y. Supp. 202; *Yeamans v. James*, 27 Kan. 195; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496.

client in a claim in litigation is to be closely scrutinized, it is not necessarily invalid; and where it appears that the parties dealt on equal terms, that the purchase was at the solicitation of the client, and that no advantage was taken of the relationship, it will be sustained.<sup>299</sup> But a very different situation was disclosed in another case, in which it appeared that an attorney at law had among his clients two old men who were feeble-minded if not actually insane and who were also his own relatives. He obtained from them an assignment of certain claims against the United States government which he was prosecuting and which he succeeded in collecting. He did not require them to act under independent advice. Further, in an action to set aside the assignment, it appeared that one of the assignors did not understand the meaning of it, and that the attorney on several occasions had advised them not to mention it to their other relations, and in several of his letters to them he had made incorrect statements, and he did not testify frankly as to what had become of a prior assignment. It was held that the assignment should be set aside.<sup>300</sup> Where an attorney sells property to his client, the latter may be entitled to rescind the transaction on account of concealments by the former which would not have given any such right but for the confidential relation of the parties; as, where the sale was of stock in a corporation, and the attorney concealed both the fact that it was his own stock which he was selling and that stock could be bought directly from the corporation at a lower price.<sup>301</sup> The rule applies also to transactions relating to the very substance of the relation, that is, the employment and compensation of the attorney. Thus, false representations made by an attorney to an inexperienced client, as a basis for an extravagant overcharge for services in securing certain property for the client, that the other claimant of the property had employed all the attorneys in the place, will support a suit for fraud.<sup>302</sup>

<sup>299</sup> *Myers v. Luzerne County* (C. C.) 124 Fed. 436.

<sup>300</sup> *Brooks v. Pratt*, 118 Fed. 725, 55 C. C. A. 515.

<sup>301</sup> *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

<sup>302</sup> *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

There is one further circumstance which distinguishes the relation of attorney and client from other fiduciary relations, namely, that the client does and must necessarily rely implicitly upon the attorney for information and guidance in matters of law. And it is as much a fraud for the attorney to deceive or mislead him by misrepresenting the law or giving him known bad advice, from motives of self-interest, as to deceive him in a matter of fact.<sup>303</sup>

§ 44. **Same; Partners, Joint Owners, and Joint Purchasers.**—The relation between partners is one of trust and confidence, so that each has the right to rely fully upon the other's good faith in any business transaction between them, and upon his making a full disclosure of all pertinent facts in his knowledge, and neither can retain an unjust advantage gained over the other by deception or treachery, though no actual and intentional fraud may be shown.<sup>304</sup> Thus, a purchase by a managing partner of his co-partner's interest in the business, the seller being ignorant of the condition of the firm's affairs, will not be sustained unless it is shown that the price given was adequate and that the buyer communicated all the information in his possession necessary to enable the seller to form a correct judgment.<sup>305</sup> The same rule applies in the case of persons joining together in the purchase of property, and in the case of joint owners of property making a sale of it.<sup>306</sup> Where one person occupies towards another the position of a joint purchaser, it becomes his duty fully and honestly to disclose the true purchase price of the property to be acquired, and he lays himself open to an action for fraud or for deceit if

<sup>303</sup>Allen v. Frawley, 106 Wis. 638, 82 N. W. 593.

<sup>304</sup>Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Hasberg v. McCarty, 13 Daly (N. Y.) 415; Pomeroy v. Benton, 77 Mo. 64.

<sup>305</sup>Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732. The managing partner in a mine, having concealed from his co-partner the fact that valuable ore had been found during the latter's absence, and having misled him as to the true condition of the mine by letters in which he concealed this fact, a sale by the latter to the former at a grossly inadequate price will be set aside as fraudulent. Bowman v. Patrick (C. C.) 36 Fed. 138.

<sup>306</sup>Hodge v. Twitchell, 33 Minn. 389, 23 N. W. 547; King v. Wise, 43 Cal. 629.

he misrepresents the matter and induces his associate to contribute more than his share of the actual consideration paid.<sup>307</sup> In a case in Ohio, it appeared that several persons formed a syndicate or partnership for the purchase of a tract of land, expecting to sell it again at a profit. They relied on the representations of one of their number that the land contained valuable deposits of coal. That person, however, was secretly the agent of the vendor of the land, and was in reality merely taking the land at a fixed price and selling it to his associates at a much larger price. On discovering the fraud, and failing to find coal on the land, the associates promptly elected to rescind the contract and tendered a reconveyance to the vendor, who had retained possession. It was held that a decree for rescission should be granted.<sup>308</sup> In another illustrative case, lessees of a mining property held an option to purchase it for \$75,000, but they also had a separate agreement with the owner to refund them \$35,000 in case they bought at the price named in the option. They solicited one P. to join them in the purchase of the mine, showing him the option, but concealing the fact that the other agreement existed. He agreed to take a half interest in the property for \$37,500. The lessees had not enough money to carry out their part of the purchase, and applied to C. to advance funds to them. To him they disclosed all the facts and showed both the agreements, and he agreed to advance the money necessary to make the payments until the real consideration (\$40,000) should be paid, and then he was secretly to receive the subsequent payments made by P. For this accommodation he was to receive interest on his money and also a third interest in the lessees' half of the property. A first payment of \$20,000 was made, but then P. became suspicious and refused to pay any more, and through some arrangement with the lessees, C. completed the payments and obtained title to the property. It was held that by intentionally joining

<sup>307</sup> *Hinton v. Ring*, 111 Ill. App. 369; *Paddock v. Bray*, 40 Tex. Civ. App. 226, 88 S. W. 419; *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227; *McMullen v. Harris*, 165 Iowa, 703, 147 N. W. 164.

<sup>308</sup> *Yeoman v. Lasley*, 40 Ohio St. 190. And see *Houts v. Scharbauer*, 46 Tex. Civ. App. 605, 103 S. W. 679.



with the others in the deception of P., he became a joint purchaser and assumed the obligations of good faith incident to that relationship, and that both he and the property in his hands were liable for the amount necessary to make restitution for the fraud.<sup>809</sup>

So, also, the relation between several persons who are joint owners of a property is so far a relation of trust and confidence as to require a full disclosure to all of them of all the facts concerning a proposed sale of the property and the consideration therefor; and if some of the joint owners induce the others to sell their interests, for an inadequate price, by concealing facts which enhance the value of the property, or concealing the fact that they are to receive a secret bonus, or that they intend to resell at a higher price which has already been offered to them, it is a fraud in law.<sup>810</sup> And on similar principles it is held that, in the formation of a corporation, there is a mutual trust between the parties, and a false representation as to the actual cost of material furnished by one of the parties and going into such joint enterprise, and for part of which the party making the representations receives the price from the other, constitutes a breach of faith and is actionable.<sup>811</sup>

§ 45. **Same; Parent and Child.**—The doctrine of the best modern authorities is that the relation of parent and child is one of such trust and confidence that each is entitled to rely implicitly upon the truth and fairness of the other in any business transaction between them, and that any abuse of the affection or the influence springing from their relationship is constructively fraudulent. Hence any contract or conveyance by which the one gains an apparently inequitable advantage over the other, or which bears a suspicious aspect, will be closely scrutinized by a court of equity.<sup>812</sup> At the same time, a contract between parent

<sup>809</sup> *Cunningham v. Pettigrew*, 169 Fed. 335, 94 O. C. A. 457.

<sup>810</sup> *Upton v. Welsling*, 8 Ariz. 298, 71 Pac. 917; *Jennings v. Rickard*, 10 Colo. 395, 15 Pac. 677; *Christy v. Campbell*, 36 Colo. 261, 87 Pac. 548; *Jones v. McElroy*, 134 Ga. 857, 68 S. E. 729, 137 Am. St. Rep. 276.

<sup>811</sup> *Garrett v. Wannfried*, 67 Mo. App. 437.

<sup>812</sup> *Saunders v. Greever*, 85 Va. 252, 7 S. E. 391; *Wright v. Ver*



and child, or a gift or grant from one to the other, is not to be presumed fraudulent from the mere fact of their relationship, so as to impose on the party defending it the burden of showing affirmatively the honesty and good faith of the transaction, but, to overturn it, there must also be some evidence of deceit, trickery, imposition, or undue influence, or of advantage taken of circumstances giving the one party a dominating position over the other.<sup>813</sup>

A deed or grant to a parent, made by a minor child or by one who has recently attained his majority, will be subject to some suspicion in a court of equity, and the circumstances attending will be carefully examined. But if it is shown that such a conveyance was voluntarily made and fully understood by the child, and that the transaction was fair and reasonable, and not disadvantageous to the grantor, there is no reason why it should be set aside as constructively fraudulent.<sup>814</sup> But it should be observed that we are at present only considering transactions of this kind as viewed in the light of actual or legal fraud. Undue influence is a different matter, which will be discussed in a later chapter. At present it may suffice to remark that a minor child is presumed to be under the influence of his

Plank, 8 De G., M. & G. 137; *Cocking v. Pratt*, 1 Ves. 400; *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577.

<sup>813</sup> *Jenkins v. Pye*, 12 Pet. 241, 9 L. Ed. 1070; *Alcorn v. Alcorn* (C. C.) 194 Fed. 275; *Broadbuss v. James*, 13 Cal. App. 464, 110 Pac. 158; *Saufley v. Jackson*, 16 Tex. 584; *Burch v. Nicholson*, 157 Iowa, 502, 137 N. W. 1066; *Gabriel v. Gabriel*, 79 Misc. Rep. 346, 139 N. Y. Supp. 778; *Millican v. Millican*, 24 Tex. 426; *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; *Kennedy v. Bates*, 142 Fed. 51, 73 C. C. A. 237; *Towson v. Moore*, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Neal v. Neal*, 155 Ala. 604, 47 South. 66; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. E. 240; *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Wright's Ex'r v. Wright*, 32 Ky. Law Rep. 659, 106 S. W. 856; *Rader v. Rader*, 108 Minn. 139, 121 N. W. 393; *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177; *Carney v. Carney*, 196 Pa. 34, 46 Atl. 264; *Marking v. Marking*, 106 Wis. 292, 82 N. W. 133. Contra, see *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645; *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577.

<sup>814</sup> *Ferns v. Chapman*, 211 Ill. 597, 71 N. E. 1106; *Chapman v. Ferns*, 118 Ill. App. 116.

parent, though there is also the natural presumption that a parent intends to benefit rather than to injure his child. The result is that if a conveyance from a child to its parent is shown to have been without consideration, or for an inadequate consideration, the burden will be cast upon the parent to show either that it was not induced by any parental duress or control or else that it was for the best interests of the child.<sup>315</sup> And in any circumstances, a court will be justified in setting aside such a conveyance if there is any proof of intimidation, misrepresentation, or actual fraud.<sup>316</sup> But it is said that, after a child has attained his majority, there is no such confidential relation between him and his mother that a conveyance by the former to the latter must be regarded as presumptively fraudulent, though it may be set aside on proof of any actual fraud or deceit.<sup>317</sup>

In the converse case—that of a gift or grant from a parent to a child—there is no necessary presumption of fraud, but on the contrary, the conferring of benefits by a parent on a child is presumptively valid, even though the act was unwise or improvident, and a presumption of constructive fraud arises only when it is shown that the child had a dominating or controlling influence over the parent.<sup>318</sup> But in this case any actual fraud will be fatal to the validity of a transfer or contract, as in a case where a son misleads his father into signing a deed when he supposes it is a release of curtesy rights,<sup>319</sup> or obtains a deed of his mother's property for an inadequate consideration by falsely representing to her that there is a lien on the property for a sum which she is unable to pay,<sup>320</sup> or where one takes advantage of a parent's advanced age and impaired faculties to get property from him for a small consideration and by a transaction which the grantor does not clearly understand.<sup>321</sup>

<sup>315</sup> *Cooley v. Stringfellow*, 164 Ala. 460, 51 South. 321.

<sup>316</sup> *Stevens v. Stevens*, 10 Kan. App. 259, 62 Pac. 714.

<sup>317</sup> *Burch v. Nicholson*, 157 Iowa, 502, 137 N. W. 1066.

<sup>318</sup> *Curtis v. Armagast*, 158 Iowa, 507, 138 N. W. 873; *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058; *Wright's Ex'r v. Wright*, 32 Ky. Law Rep. 659, 106 S. W. 856.

<sup>319</sup> *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135; *Brown v. Trent*, 36 Okl. 239, 128 Pac. 895.

<sup>320</sup> *Davis v. Yancy*, 31 Ky. Law Rep. 1155, 104 S. W. 697.

<sup>321</sup> *Thorn v. Thorn*, 51 Mich. 167, 16 N. W. 324.

So also, secrecy and the absence of any independent advice may go far towards stamping a transaction as fraudulent, where the parent was old and feeble and confided much to the judgment and discretion of the child.<sup>322</sup> And great inadequacy of price may be sufficient to justify the interference of a court of equity, where it is also shown that the grantee took advantage of the financial troubles of the grantor.<sup>323</sup> But the advanced age of the parent, even though extreme, will not be sufficient, by itself alone, to warrant a presumption of fraud,<sup>324</sup> especially when there is nothing to show that he depended in any way upon the advice or guidance of the child.<sup>325</sup>

§ 46. **Same; Brother and Sister.**—The relation between a brother and sister is normally one of such trust and confidence that they are required to exhibit the utmost good faith in any business transaction between them, and each is entitled to rely upon the statements and advice of the other, without assuming that attitude of vigilance and distrust which is expected of persons dealing at arms' length. Hence if the one takes advantage of his knowledge of facts concerning the subject-matter of the contract, which are unknown to the other, and abuses the confidence reposed in him, and thereby gains an unjust advantage, the contract is presumptively fraudulent, and will be set aside unless the party so benefiting by it can show it to have been such as equity may approve.<sup>326</sup> This presumption is of course much strengthened if it is shown that the party alleged to have been defrauded did actually and habitually repose great confidence in the other, or was usually man-

<sup>322</sup> *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345.

<sup>323</sup> *Bradley v. Bradley*, 28 Ky. Law Rep. 1261, 91 S. W. 1143.

<sup>324</sup> *Gabriel v. Gabriel*, 79 Misc. Rep. 346, 139 N. Y. Supp. 778, affirmed, 160 App. Div. 901, 144 N. Y. Supp. 1117.

<sup>325</sup> *Lodge v. Hulings*, 63 N. J. Eq. 159, 51 Atl. 1015.

<sup>326</sup> *Bowen v. Kutzner*, 167 Fed. 281, 93 C. C. A. 33; *Sears v. Shaffer*, 6 N. Y. 268; *Reeder v. Meredith*, 78 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22; *Todd v. Grove*, 33 Md. 188; *Richards v. Sutter*, 94 Ark. 621, 125 S. W. 1018; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Harvey v. Mount*, 8 Beav. 439. But compare *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 61; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

aged and controlled by the other in his conduct and his business affairs,<sup>327</sup> and on the other hand, the presumption is much weakened, if not entirely removed, when it appears that the party complaining was fully informed of the facts and had the benefit of independent advice.<sup>328</sup> But any actual false representations made by the one to the other, when coupled with their confidential relationship, will invalidate the contract, though perhaps they might not have been sufficient to do so in the case of strangers dealing with each other.<sup>329</sup>

There is no presumption of a fiduciary relationship between two brothers where both are men of mature years and both have had experience in the matters of business to which their contract relates. But if it is shown that the one brother was the elder, and was much superior to the other in intelligence, business capacity, and firmness of character, and in fact sustained a quasi paternal relation to him, these circumstances impose such a special duty upon the dominant brother that any transaction by which he gains an undue advantage over the other will be constructively fraudulent and will be annulled in equity.<sup>330</sup> But the presumption does not extend to the case of brothers-in-law. The affinity between them does not create a fiduciary relation of one to the other nor raise any presumption of confidence and trust reposed by one in the other.<sup>331</sup>

§ 47. **Same; Husband and Wife.**—It has generally been held that the relation of husband and wife is peculiarly one of trust and confidence, within the rules we are considering, that each owes to the other the duty of perfect fairness in any transaction between them, and that, while a contract between them is not presumptively fraudulent from the mere fact of their marital relation, yet if either complains of hav-

<sup>327</sup> *Creamer v. Bivert*, 214 Mo. 473, 113 S. W. 1118; *Jenkins v. Jenkins*, 66 Or. 12, 132 Pac. 542.

<sup>328</sup> *Lozier v. Hill*, 68 N. J. Eq. 300, 59 Atl. 234.

<sup>329</sup> *Kelley v. Radakin*, 24 R. I. 101, 52 Atl. 678; *Akers v. Martin*, 110 Ky. 335, 61 S. W. 465; *Dashner v. Buffington*, 170 Mo. 260, 70 S. W. 699.

<sup>330</sup> *Shevlin v. Shevlin*, 96 Minn. 398, 105 N. W. 257.

<sup>331</sup> *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941.

ing been overreached, equity will scrutinize the matter with a most jealous eye and will seize upon any slight evidence of fraud, deceit, or undue influence to annul the transaction.<sup>382</sup> Probably this rule is a survival from the rigorous doctrines of the common law, prevalent in a by-gone age, by which husband and wife could not validly contract with each other at all. And undoubtedly it is still reasonable and just in so far as it means that a wife is entitled to trust her husband fully in any business affair and is not bound to suspect him of a sinister purpose or be on her guard against fraud, and vice versa. But so far as concerns the presumption that a husband dominates his wife or may be supposed to have exercised an undue influence over her in any dealing between them, the emancipation of married women has now proceeded so far that such a presumption would be discredited as a fact in sociology, and therefore is no longer tenable in law. In effect, it has been distinctly ruled that a husband is not dominant over his wife as a matter of law, so as to create a presumption that any gift which she may make to him results from the exercise of his undue influence, but the question of his actual dominance is one of fact.<sup>383</sup> And where, as a matter of fact, the parties are not on good terms with each other, and the terms of a settlement between them are fully discussed and maturely considered, each being careful and deliberate in looking after his own interests, and there is no great disparity between them in respect to mental capacity and firmness of mind, nothing whatever in the way of fraud or undue influence can be inferred from the mere fact of their relationship.<sup>384</sup>

<sup>382</sup> *Jones v. Jones*, 140 Cal. 587, 74 Pac. 143; *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4; *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65; *Corcoran v. Corcoran*, 119 Ind. 138, 21 N. E. 468, 4 L. R. A. 782, 12 Am. St. Rep. 390; *Paulus v. Reed*, 121 Iowa, 224, 96 N. W. 757; *Douglass v. Douglass*, 51 La. Ann. 1455, 26 South. 546; *Menne's Heirs v. Menne*, 15 Ky. Law Rep. 774, 25 S. W. 592; *Jenne v. Marble*, 37 Mich. 319; *Witbeck v. Witbeck*, 25 Mich. 439; *Farmer v. Farmer*, 39 N. J. Eq. 211; *Garver v. Miller*, 16 Ohio St. 527.

<sup>383</sup> *Mahan v. Schroeder*, 236 Ill. 392, 86 N. E. 97; *Griffin v. Birkhead*, 84 Va. 612, 5 S. E. 685.

<sup>384</sup> *Crawford v. Crawford*, 24 Nev. 410, 56 Pac. 94.

§ 48. **Same; Executors or Administrators and Beneficiaries.**—Executors and administrators occupy a position of technical trust, and the rules under consideration apply to them with full force. They are not absolutely prohibited from dealing with the legatees or beneficiaries in respect to the interests of the latter in the estate. But if they do, they must meet and overcome the presumption of fraud which the law raises against them. That is, they must show the entire fairness of the transaction, and will not be allowed to retain any advantage they may have gained if there is evidence of any misrepresentation, concealment or deceit, or evidence of any advantage taken of the inexperience, ignorance, or trustfulness of the other party.<sup>885</sup> And the fact that a testator appoints a certain man to be the executor of his will, and excuses him from giving bonds, amounts, in effect, to a declaration by the testator to his wife that the executor named is, in his opinion, a man on whose personal integrity she can implicitly rely, and therefore the executor occupies a fiduciary relation to the wife.\*

§ 49. **Same; Physicians and Patients.**—From the time the relation of physician and patient is established until it is definitely terminated, it is regarded in law as strictly and necessarily a confidential relation, and any business transactions between the parties will be closely scrutinized. To invalidate a conveyance or gift from the patient to his medical adviser, it is not necessary to show any actual fraud. But if the latter gains an inequitable advantage over the former in any business dealing between them, he will not be allowed to retain it if it appears that it was gained by any misrepresentation or deceit, by undue influence or overpersuasion, by playing upon the patient's fears or hopes, by taking advantage of his feeble condition to im-

<sup>885</sup> Swayze v. Burke, 12 Pet. 11, 9 L. Ed. 980; Williams v. Powell, 66 Ala. 20, 41 Am. Rep. 742; Humphreys v. Burleson, 72 Ala. 1; West v. Waddill, 33 Ark. 575; Collier v. Collier, 137 Ga. 658, 74 S. E. 275, Ann. Cas. 1913A, 1110; Ehrich v. Brunshwiler, 241 Ill. 592, 89 N. E. 799; Stephens v. Collison, 249 Ill. 225, 94 N. E. 664; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Whitted v. Nash, 66 N. C. 590.

\*Rogers v. Brightman, 189 Ala. 228, 66 South. 71.

pose upon him, or merely by abusing his mistaken trust and confidence.<sup>336</sup> Of course the suspicion of undue influence or unfair play may be removed by satisfactory evidence.<sup>337</sup> But generally the physician must assume the burden of proving that the patient had competent and disinterested advice, or else that he entered into the transaction voluntarily, with a full understanding of its nature and effect, and without being unduly influenced.<sup>338</sup>

As to pecuniary transactions between a patient and his nurse the authorities are scanty and in conflict. In one case it is said that there is, perhaps, no relationship between men more calculated to make the will of one subservient to that of the other than the relation of patient and nurse, especially when continued throughout a period of years.<sup>339</sup> But in another case, it is ruled that the relationship of mistress and servant, patient and nurse, and aunt and nephew, all combined, does not raise a presumption of undue influence.<sup>340</sup>

**§ 50. Same; Priests, Pastors, and Spiritual Advisers.—** A person is supposed to be so far under the influence and control of any ecclesiastical personage who occupies the position of his pastor or spiritual adviser, and to repose such confidence in his advice, that any transaction between them which appears to be improvident or without adequate consideration—such, for instance as a grant or donation either to the ecclesiastic himself or to some religious use suggested by him—will be subject to a strong suspicion of undue influence or constructive fraud, and can be sustained

<sup>336</sup> *Zeigler v. Illinois Trust & Sav. Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127; *Butler v. Gleason*, 214 Mass. 248, 101 N. E. 371; *Norfleet v. Beall*, 82 Miss. 538, 34 South. 328; *Cadwallader v. West*, 48 Mo. 483; *Matthael v. Pownall*, 235 Pa. 460, 84 Atl. 444; *Audenreid's Appeal*, 89 Pa. 114, 33 Am. Rep. 731; *Viallet v. Consolidated Ry. & Power Co.*, 30 Utah, 260, 84 Pac. 496, 5 L. R. A. (N. S.) 663; *Peterson v. Budge*, 35 Utah, 596, 102 Pac. 211; *Pratt v. Barker*, 4 Russ. 507; *Popham v. Brooke*, 5 Russ. 8; *Billage v. Southee*, 9 Hare, 534.

<sup>337</sup> *Kellogg v. Peddicord*, 181 Ill. 22, 54 N. E. 623.

<sup>338</sup> *Zeigler v. Illinois Trust & Sav. Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127.

<sup>339</sup> *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087.

<sup>340</sup> *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.



only on proof of perfect fairness and candor, the full disclosure of all material facts, and the exercise of an intelligent and unconstrained will.<sup>341</sup> Such was the ruling made in a case where a priest induced one of his parishioners to make a deed conveying land for the use of a certain Catholic school. He accomplished this purpose by exhibiting to the grantor a paper writing which the grantor's deceased father had left with his will, in which the father stated that it was his wish that the property in question should go to the said school. But this paper, though signed, was not witnessed. The priest had been advised by attorneys that it was entirely invalid as a will for the want of proper attestation, but he failed to disclose this advice to the grantor. It was held that it was his duty to have given proper information and advice on this point, in view of the relation of the parties, and for that reason the deed was subject to be set aside.<sup>342</sup>

§ 51. Same; Directors and Stockholders of Corporations.—Ordinarily, the relation between a director and a shareholder of a business corporation is not of such a fiduciary character that the director may not purchase the shareholder's stock without disclosing to him the facts within his knowledge which may affect its value.<sup>343</sup> But special circumstances in the particular case may clothe the director with such a trust as to make his concealment of material facts a fraud which will justify the setting aside of a purchase so made.<sup>344</sup> Thus, in a case before the Supreme

<sup>341</sup> *McClellan v. Grant*, 181 N. Y. 581, 74 N. E. 1119; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Ford v. Hennessy*, 70 Mo. 580; *Caspari v. First German Church*, 12 Mo. App. 293; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355; *Huguenin v. Basely*, 14 Ves. 273; *Norton v. Relly*, 2 Eden, 286. Contra, *Jackson v. Ashton*, 11 Pet. 229, 9 L. Ed. 698.

<sup>342</sup> *Finegan v. Thelsen*, 92 Mich. 173, 52 N. W. 619.

<sup>343</sup> *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Krumbhaar v. Griffiths*, 151 Pa. 223, 25 Atl. 64; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245; *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426.

<sup>344</sup> *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853; *Stewart v. Harris*, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E.



Court of the United States, it appeared that the action was to set aside a sale of corporate stock. At the time of the sale, the defendant was a director of the corporation, the owner of three-fourths of its stock, and its general manager, invested with large powers, and he was then engaged in negotiations which finally led to the sale of the company's lands to the government at a price which greatly enhanced the value of the stock, so that, at the time of suit brought, it was worth more than eight times as much as at the date of the sale. He employed an agent to buy up the plaintiff's stock, and concealed from the plaintiff both his own identity as the purchaser and his knowledge of the state of the negotiations and their probable successful result. In these circumstances, it was held that he occupied such a fiduciary relation to any and all of the stockholders as required him to disclose all the facts within his knowledge affecting the value of the shares before making any purchase, and that his concealment of such matters was such a fraud as justified the rescission of the sale.<sup>345</sup> So, where a director and active manager of a corporation, who owns five-sixths of its stock, alarms a fellow director, the owner of the remaining sixth, by false statements of the financial condition of the company, with intent to induce him to part with his holdings at a grossly inadequate price, and procures from him a contract to sell for such price, payable partly in cash, partly in notes made or indorsed by the manager, and partly in the stock of a corporation organized by him for the purpose of acquiring the assets of the other corporation, and constituting the manager attorney in fact to carry out the transaction, and, in consummating the contract, the manager secretly takes title to the stock himself, such facts show such a case of fraud and deceit as to entitle the seller to relief against the buyer, aside from any question as to the relations between the parties at the time of the transaction. <sup>346</sup>

232; *Fisher v. Budlong*, 10 R. I. 525; *Hoffman Steam Coal Co. v. Cumberland, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311.

<sup>345</sup> *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853.

<sup>346</sup> *George v. Ford*, 36 App. D. C. 315.

§ 52. **Signing Instrument Without Reading It.**—A person who signs a written instrument without reading it, when he had ability and opportunity to do so, cannot afterwards complain that he did not know its contents. To state the rule more fully,—when a person can read English, and is so far in the possession of his faculties that he can read and understand a written instrument at the time it is presented to him for signature, and is not in any way prevented or dissuaded from doing so, and is not tricked into signing it by any false representation or positive fraud, but nevertheless signs without reading, he is guilty of such negligence that he cannot obtain relief in equity upon afterwards discovering that the instrument is different from what he supposed it to be, or that it imposes obligations which he had not intended to assume, or is more onerous or disadvantageous than he expected it to be.<sup>347</sup> This rule,

<sup>347</sup> *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121; *Ellicott Machine Co. v. United States*, 43 Ct. Cl. 469; *Wooddy v. Matthews* (Ala.) 69 South. 607; *Lester v. Walker*, 172 Ala. 104, 55 South. 619; *Alosi v. Birmingham Waterworks Co.*, 1 Ala. App. 630, 55 South. 1029; *Walter Pratt & Co. v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Mitchell Mfg. Co. v. Ike Kempner & Bro.*, 84 Ark. 349, 105 S. W. 880; *Ingram v. Coleman*, 110 Ark. 632, 160 S. W. 886; *Stone v. Prescott Special School Dist.* (Ark.) 178 S. W. 399; *Sisk v. Caswell*, 14 Cal. App. 377, 112 Pac. 185; *Muncy v. Thompson*, 26 Cal. App. 634, 147 Pac. 1178; *Harrison v. Wilson Lumber Co.*, 119 Ga. 6, 45 S. E. 730; *Georgia Medicine Co. v. Hyman*, 117 Ga. 851, 45 S. E. 238; *Patapsco Shoe Co. v. Bankston*, 10 Ga. App. 675, 74 S. E. 60; *Beist v. Site*, 16 Ind. App. 4, 44 N. E. 762; *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103, 865; *Bonnot Co. v. Newman*, 108 Iowa, 158, 78 N. W. 817; *Mower Hardwood Creamery & Dairy Supply Co. v. Hill*, 135 Iowa, 600, 113 N. W. 466; *Blossi v. Chicago & N. W. R. Co.*, 144 Iowa, 697, 123 N. W. 360, 26 L. R. A. (N. S.) 255; *J. I. Case Threshing Machine Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *McGregor v. Metropolitan Life Ins. Co.*, 143 Ky. 488, 136 S. W. 889; *J. M. Case Mill Mfg. Co. v. Vickers*, 147 Ky. 396, 144 S. W. 76; *Huber Mfg. Co. v. Piersall*, 150 Ky. 307, 150 S. W. 341; *United Talking Mach. Co. v. Metcalf*, 164 Ky. 258, 175 S. W. 357; *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 676, 77 Atl. 310; *Smith v. Humphreys*, 104 Md. 285, 65 Atl. 57; *McEwan v. Ortman*, 34 Mich. 325; *Gwin v. Waggoner*, 98 Mo. 315, 11 S. W. 227; *Parls Mfg. & Importing Co. v. Carle*, 116 Mo. App. 581, 92 S. W. 748; *International Text Book Co. v. Lewis*, 130 Mo. App. 153, 108 S. W. 1118; *Ely v. Sutton*, 177 Mo. App. 546, 162 S. W. 755; *Avery Co. v. Powell*, 174 Mo. App. 628, 161 S. W. 335; *Spelman v. Delano*, 187 Mo. App. 119, 172 S. W. 1163; *Sanden v. Northern Pac. Ry. Co.*,

however, is subject to numerous exceptions, or rather, there are numerous circumstances which will rebut the presumption of negligence in signing a paper without reading it, or which will excuse the party for his failure to do so, as, for instance, where it is misread to him or its contents misrepresented, where he is prevented from reading it, or where he is illiterate, or temporarily deprived of the use of his eyesight. These various cases will be fully considered in the succeeding sections. At present it is necessary to observe that the general rule does not apply where one's signature to a document is obtained, without his reading it, by means of any actual fraud, trick, or artifice,<sup>848</sup> or by representations upon which he has a right to rely, but which are false and fraudulent,<sup>849</sup> as, when they are made by one occupy-

43 Mont. 209, 115 Pac. 408, 34 L. R. A. (N. S.) 711; *Hennessey v. Holmes*, 46 Mont. 89, 125 Pac. 132; *Howell v. Bloom* (Sup.) 117 N. Y. Supp. 893; *Leonard v. Southern Power Co.*, 155 N. C. 10, 70 S. E. 1061; *Colonial Jewelry Co. v. Bridges*, 43 Okl. 813, 144 Pac. 577; *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058; *Foster v. University Lumber & Shingle Co.*, 65 Or. 46, 131 Pac. 736; *Cosgrove v. Woodward*, 49 Pa. Super. Ct. 228; *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431; *Reed v. Coughran*, 21 S. D. 257, 111 N. W. 559; *Gulf, C. & S. F. Ry. Co. v. Fenn*, 33 Tex. Civ. App. 352, 76 S. W. 597; *Kansas City Packing Box Co. v. Spies* (Tex. Civ. App.) 109 S. W. 432; *Lewis v. Whitworth* (Tex. Civ. App.) 54 S. W. 1077; *Parrott v. Peacock Military College* (Tex. Civ. App.) 180 S. W. 132; *Larsen v. Oregon Short Line R. Co.*, 38 Utah, 130, 110 Pac. 983; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221; *R. D. Johnson Milling Co. v. Read* (W. Va.) 85 S. E. 726; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N. W. 1124. The rule that both parties in making a contract must assent to the same thing in the same sense has no reference to the misconception of a party to the contract wholly unauthorized by the language of the contract. *Teachout v. Clough*, 143 Mo. App. 474, 127 S. W. 672.

<sup>848</sup> *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *Providence Jewelry Co. v. Crowe*, 113 Minn. 209, 129 N. W. 224; *Goetz v. Sona*, 65 Ill. App. 78; *Birmingham Ry. Light & Power Co. v. Jordan*, 170 Ala. 530, 54 South. 280; *Muller v. Rosenblath*, 157 App. Div. 513, 142 N. Y. Supp. 602.

<sup>849</sup> *Givan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Disney v. St. Louis Jewelry Co.*, 76 Kan. 145, 90 Pac. 782; *St. Louis Jewelry Co. v. Bennett*, 75 Kan. 743, 90 Pac. 246; *Loyd v. Phillips*, 123 Wis. 627, 101 N. W. 1092; *J. Well & Co. v. Quidnick Mfg. Co.*, 33 R. I. 58, 80 Atl. 447; *Compagnie Des Metaux Unital v. Victoria Mfg. Co.* (Tex. Civ. App.) 107 S. W. 651.

ing a fiduciary or confidential relation to him.<sup>850</sup> Thus, a business man had been accustomed for several years to sign deeds prepared by his son conveying small town lots, without reading them, on the representation of the son in each case. On one occasion the son presented to him a deed for his signature, stating, as usual, that it conveyed one of the town lots, and the father signed without reading it. But in reality it conveyed all the father's interest in his deceased wife's real estate for a nominal consideration. It was held that the deed might be set aside as fraudulent.<sup>851</sup> So, a traveling salesman who procures an order for goods and undertakes to write out the order must write it according to the agreement, and if the written order does not embody the agreement, the buyer, signing it through inadvertence or negligence without reading it, may nevertheless avoid it on the ground of fraud.<sup>852</sup> So again, where two persons were induced to sign their names to a printed form of contract for the purchase of a book, by a fraudulent representation made to one that he was writing his name only to show how it was spelled, and to the other that he was signing his name only as an autograph, it was held that neither was bound, though they were negligent in failing to ascertain what was printed on the papers they signed.<sup>853</sup> But where a defendant knows that he is signing a contract which imports an obligation, and has an opportunity to read it, but chooses to sign without reading, he is bound by its terms, although the plaintiff may have stated its contents imperfectly, if there has been no concealment

<sup>850</sup> *Haag v. Burns*, 22 S. D. 51, 115 N. W. 104.

<sup>851</sup> *Hale v. Hale*, 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221.

<sup>852</sup> *J. Well & Co. v. Quidnick Mfg. Co.*, 33 R. I. 58, 80 Atl. 447. And see *Granger v. Kishi* (Tex. Civ. App.) 153 S. W. 1161.

<sup>853</sup> *Alexander v. Brogley*, 63 N. J. Law, 307, 43 Atl. 888. But see *Williams v. Leisen*, 72 N. J. Law, 410, 60 Atl. 1096. In this case, to avoid liability on a written contract for the purchase of books, defendant testified that plaintiff's agent told him that he wanted to get some influential citizens to indorse the work; that he did not read the contract, but signed his name only to indorse the work to other citizens, and that the agent did not tell him that he was signing a contract to buy the books. But this was held insufficient to exonerate the defendant from the contract.

or misrepresentation of its purport.<sup>354</sup> And in a case such as this, if a person trusts to representations which are not calculated to impose upon a person of ordinary prudence, or neglects the means of information within easy reach, he must suffer the consequences.<sup>355</sup>

Again, it is said that the failure to read a written instrument before signing it may be excused by the presence of an emergency requiring haste in its execution.<sup>356</sup> Such an emergency might well be supposed to exist, for instance, in the case of a person who has suffered personal injuries in an accident, and who is urged and hurried into signing a release of damages while he is in a dazed or stupefied condition, or suffering so severely from shock or pain as to be incapable either of resisting pressure or understanding distinctly what he is doing; and it is so ruled.<sup>357</sup> But no such emergency exists, nor any sufficient excuse for failure to read the instrument, merely because the party signing it was in a hurry to attend to other business, to catch a train, or the like,<sup>358</sup> nor because the person at whose instance it was signed represented himself as being pressed for time and therefore urged hasty action.<sup>359</sup>

And it will be difficult, if not impossible, for one to produce an excuse acceptable in law for his failure to read over an instrument before signing it, when his attention was particularly directed to the importance of acquainting himself

<sup>354</sup> *Alexander v. Ferguson*, 73 N. J. Law, 479, 63 Atl. 998.

<sup>355</sup> *Bradford v. Wright*, 145 Mo. App. 623, 123 S. W. 108.

<sup>356</sup> *Truitt-Silvey Hat Co. v. Callaway & Truitt*, 130 Ga. 637, 61 S. E. 481; *Rounsaville & Bro. v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030.

<sup>357</sup> *Union Pac. R. Co. v. Whitney*, 198 Fed. 784, 117 C. C. A. 392; *Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 262; *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; *Erickson v. Northwest Paper Co.*, 95 Minn. 356, 104 N. W. 291; *Ballard v. Chicago, R. I. & P. R. Co.*, 70 Mo. App. 108; *Mensforth v. Chicago Brass Co.*, 142 Wis. 546, 126 N. W. 41, 512, 135 Am. St. Rep. 1084.

<sup>358</sup> *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067; *J. I. Case Threshing Machine Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *Relly v. Daly*, 2 Pa. Super. Ct. 540.

<sup>359</sup> *United Breeders' Co. v. Wright*, 139 Mo. App. 195, 122 S. W. 1105; *Potts v. Riddle*, 5 Ga. App. 378, 63 S. E. 253; *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 South. 715.

with its contents. Such is the case, for example, where the very first line of the contract, printed in heavy type, warns the person to read it before signing,<sup>360</sup> or where one signed a paper without reading it, supposing it to be merely a receipt for money, but the instrument itself stated in capital letters at the beginning that it was a release of all claims for damages,<sup>361</sup> or where a draft of the paper had been submitted to the party's counsel, who made some changes and additions.<sup>362</sup> In another case, the defendant omitted to read a contract which he was signing, supposing it to be a contract for the consignment of goods on commission, whereas it was a contract of sale. There was some evidence that the plaintiff's agent had misled him as to the character of the contract. But the plaintiff and his agent were both strangers to the defendant, and it was shown that the latter had good eyesight and was a business man of average intelligence and considerable experience, and that he had been requested to read the contract. Further, it was shown that a few lines of the paper, just before his signature, were such that a casual glance at them would have shown that the instrument was not a commission contract. The defendant's only excuse for failure to read it was that he was busy, and that he was not accustomed to read papers when signing them. It was held that he was not justified in relying on what was told him, and must abide by the contract.<sup>363</sup> And of course one who signs a contract after having read it cannot complain of false representations as to its contents.<sup>364</sup>

**§ 53. Same; Rule for Illiterate Persons and Foreigners.**—It is the duty of one who understands the English language when spoken, but who cannot read it, to make himself acquainted with the contents of any business document which he is asked to sign, before signing it, and to

<sup>360</sup> *International Text-Book Co. v. Lewis*, 130 Mo. App. 158, 108 S. W. 1118.

<sup>361</sup> *Hartley v. Chicago & A. R. Co.*, 214 Ill. 78, 73 N. E. 398.

<sup>362</sup> *American Fine Art Co. v. Simon*, 140 Fed. 529, 72 C. C. A. 45.

<sup>363</sup> *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016.

<sup>364</sup> *Nicol v. Young*, 68 Mo. App. 448.

that end, to procure it to be read aloud to him by a friend or adviser or by some disinterested third person, to listen attentively, and to have it explained to him if necessary, and he is chargeable with knowledge of the contents of the paper whether he does this or not.<sup>365</sup> If he omits this ordinary precaution of having the instrument read to him, he is chargeable with such negligence as will estop him from denying knowledge of its terms and preclude him from obtaining relief from it, in the absence of any fraud or trick practised upon him.<sup>366</sup> The opposite party to the contract may assume the duty of reading it to the illiterate person or of informing him of its nature, terms, and conditions. But if he does so, he must read or state it with scrupulous fidelity. If he misreads it, either by reciting provisions which it does not contain or by omitting part of what it does contain, if he falsely states that it embodies correctly the oral agreement which the parties had already reached, or if in any way he misrepresents the nature of the instrument or any of its terms or stipulations, it is a fraud which will justify the giving of relief to the injured party, notwithstanding the latter signed the paper without any other information as to what it contained.<sup>367</sup> It is even said that it is not enough for one who has made a written contract with an illiterate person to show that the contract was read to him, but it must also appear that he understood it and assented to it knowingly.<sup>368</sup> As stated in another case, an illiterate person is not bound by an instrument where he

<sup>365</sup> *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Murphy v. Hussey*, 117 La. 390, 41 South. 692; *Stern v. Moneyweight Scale Co.*, 42 App. D. C. 162.

<sup>366</sup> *Wilson, Close & Co. v. Pritchett*, 99 Md. 583, 58 Atl. 360; *McKinney v. Boston & M. R. Co.*, 217 Mass. 274, 104 N. E. 446; *Mulderrig v. Burke*, 24 Misc. Rep. 716, 53 N. Y. Supp. 1004; *Hurt v. Wallace* (Tex. Civ. App.) 49 S. W. 675. Contra, see *Trambly v. Richard*, 130 Mass. 259; *Melle v. Candelora* (Sup.) 88 N. Y. Supp. 385.

<sup>367</sup> *Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281; *Bates v. Harte*, 124 Ala. 427, 26 South. 898, 82 Am. St. Rep. 186; *Alexander v. Dickinson* (Ark.) 101 S. W. 739; *Birdsall v. Coon*, 157 Mo. App. 439, 139 S. W. 243; *American Harrow Co. v. Swoope*, 16 Pa. Super. Ct. 451; *Atlanta & C. A. Ry. Co. v. Victor Mfg. Co.*, 93 S. C. 397, 76 S. E. 1091; *Baldwin v. Postal Telegraph Cable Co.*, 78 S. C. 419, 59 S. E. 67.

<sup>368</sup> *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686.



signs it in ignorance of its character, believing it to be an instrument of a different nature, and is induced to do so by misrepresentations of the other party, whose good faith he had no ground reasonably to suspect, though he does not request any one to read the instrument to him before signing it.<sup>869</sup> And in general, any fraud, trick, artifice, deceit, or misrepresentation practised upon an illiterate person, to induce him to sign an instrument to which he would not have agreed if he had fully understood it, will be cause for avoiding it.<sup>870</sup>

A similar rule obtains in the case of a person who, being of foreign birth, can neither read nor understand the English language, whether or not he is literate as respects his native tongue. Such a person, before signing a business document, should procure a competent interpreter to read and translate it to him and explain anything which he does not understand; and if he neglects to do this, not being prevented in any way, and no fraud or misrepresentation being practised upon him, and signs the paper nevertheless, he cannot escape liability on the plea that it is different from what he supposed he was signing.<sup>871</sup> If the services of an interpreter are brought into use, care should be taken to select one who is entirely competent. But if this is done, and if every effort is made to explain matters fully to the foreigner, and he apparently comprehends and agrees to all that is said and done, his latent misunderstanding of the situation, unknown to and not due to any fault, fraud, or collusion of the other party, will not be chargeable to the

<sup>869</sup> *Grimsley v. Singletary*, 133 Ga. 56, 65 S. E. 92, 134 Am. St. Rep. 196.

<sup>870</sup> *American Standard Jewelry Co. v. Witherington*, 81 Ark. 134, 98 S. W. 695; *Mason v. Postal Telegraph Cable Co.*, 71 S. C. 150, 50 S. E. 781; *Ward v. Spelts*, 39 Neb. 809, 58 N. W. 426; *Sands v. Melchlonda*, 186 Mass. 270, 71 N. E. 546.

<sup>871</sup> *International Text Book Co. v. Anderson*, 179 Mo. App. 631, 162 S. W. 641; *Constantine v. McDonald*, 25 Idaho, 342, 137 Pac. 531; *Dowaglac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14; *Muller v. Kelly* (C. C.) 116 Fed. 545. The decision in the case last cited was reversed on appeal (125 Fed. 212, 60 C. C. A. 170), but only on the ground that it should have been left to the jury to say whether or not the contract in question (between attorney and client) was extortionate, unconscionable, and obtained by undue means.



latter.<sup>872</sup> But if it is the opposite party to the contract who calls in the interpreter, such interpreter is the agent of the person calling him, and not of the foreigner, and if the purport of the instrument is not fully explained to the latter, either because it is not adequately stated to the interpreter, or because the interpreter does not correctly repeat it, the instrument is not binding.<sup>873</sup> And if the opposite party (or his agent or representative) assumes himself to act as interpreter, he is bound to translate and explain with exact fidelity, the foreign person having in that case the right to rely fully upon him, so that any misrepresentation or misleading statement will invalidate the contract.<sup>874</sup>

**§ 54. Same; Defective Eyesight Excusing Failure to Read.**—A person whose eyesight is so defective that he cannot read without the aid of spectacles, and who is temporarily deprived of the use of them, is in much the same position, in fact and in law, as one who cannot read at all. Before affixing his signature to any business document, he should take the precaution of having it read over to him, so that he may fully comprehend it, and if he omits to do so, he is nevertheless chargeable with a knowledge of its contents.<sup>875</sup> He may be justified, however, in relying on the opposite party's statement of the contents of the paper, more particularly where he has dictated it himself. Thus, one who employs bankers to make a draft for the price of a shipment, and forward it with the bill of lading for collection, having given the correct data, and not having with him his spectacles, without which he cannot read, is not negligent in signing the draft without having it read over to him.<sup>876</sup> And if a person in this situation is deceived or

<sup>872</sup> *Blossl v. Chicago & N. W. Ry. Co.*, 144 Iowa, 697, 123 N. W. 360, 26 L. R. A. (N. S.) 255; *Demark v. Milwaukee Electric Ry. & Light Co.*, 142 Wis. 624, 126 N. W. 13. See *Savage v. Chicago & J. Ry. Co.*, 142 Ill. App. 342.

<sup>873</sup> *Burik v. Dundee Woolen Co.*, 66 N. J. Law, 420, 49 Atl. 442.

<sup>874</sup> *Great Northern Ry. Co. v. Kasischke*, 104 Fed. 440, 43 C. C. A. 626.

<sup>875</sup> *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 Pac. 984. See *Eldorado Jewelry Co. v. Darnell*, 135 Iowa, 555, 113 N. W. 344, 124 Am. St. Rep. 309; *Netherton v. Netherton*, 142 Ga. 51, 82 S. E. 449.

<sup>876</sup> *Stoner v. Zacharay*, 122 Iowa, 287, 97 N. W. 1098.

misled by the false representations of the other party as to the terms or contents of the instrument, and therefore signs without reading it, he may avoid it on account of fraud.<sup>877</sup> But a contrary rule was applied in a case in Kentucky, where the treasurer of a school district laid before the president of the district, for his signature, a number of orders, and among them there was a promissory note. The president, who was near-sighted and did not have his spectacles, signed the note supposing it to be an order. The treasurer also signed the note and obtained the money thereon from the payee, who had no knowledge of the fraud. It was held that the president was estopped by his negligence from avoiding the note.<sup>878</sup>

§ 55. Same; Dissuading or Preventing Party from Reading.—The rule that a party's own negligence in signing a written instrument without reading it will estop him from claiming any relief against it, does not apply where he was induced so to sign it without examination by any trick, artifice, or fraud practised by the other party, whereby he was either prevented entirely from reading the instrument or successfully dissuaded from doing so.<sup>879</sup> This rule was applied in a case where a woman, able to read and in the full possession of her senses, signed a release of damages without reading it, at the instance of a claim agent, who not only falsely told her that it was a mere receipt, but folded it so that she could not see what she was signing and held it so as to prevent a proper inspection,<sup>880</sup> and in a case where, at the time a party signed a certain paper, some print-

<sup>877</sup> *Muller v. Rosenblath*, 157 App. Div. 513, 142 N. Y. Supp. 602; *Robinson v. Roberts*, 20 Okl. 787, 95 Pac. 246; *McDonald v. McKinney Nursery Co.*, 44 Okl. 62, 143 Pac. 191.

<sup>878</sup> *McCoy v. Gouvion*, 102 Ky. 386, 43 S. W. 699.

<sup>879</sup> *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Baltimore & O. R. Co. v. Morgan*, 35 App. D. C. 195; *Shook v. Puritan Mfg. Co.*, 75 Kan. 301, 89 Pac. 653, 8 L. R. A. (N. S.) 1043; *Redfield v. Baird*, 75 Kan. 837, 90 Pac. 782; *Eggleston v. Advance Thresher Co.*, 96 Minn. 241, 104 N. W. 891; *Woodbridge v. De Witt*, 51 Neb. 98, 70 N. W. 506; *Dixon v. Wilmington Savings & Trust Co.*, 115 N. C. 274, 20 S. E. 464; *Loveland v. Jenkins-Boys Co.*, 49 Wash. 369, 95 Pac. 490.

<sup>880</sup> *Roberts v. Colorado Springs & I. Ry. Co.*, 45 Colo. 188, 101 Pac. 59.

ed matter therein was intentionally concealed from his view by the other party, so that he did not know that he was signing a promissory note.<sup>381</sup> It is also said that, while a contracting party is not ordinarily justified in relying on the other party's statements as to what the paper contains, but should examine it for himself, yet this does not apply where the party making the representations has, by his own act, rendered such examination a matter of more than ordinary difficulty.<sup>382</sup> So, where the seller of goods was handed a written contract drawn up by the buyer, and glanced at it hurriedly, but took the buyer's word for it that it embodied the agreement they had already reached, being well acquainted with such buyer, and the contract was long and involved, and was so written that if the seller had read it he probably would not have discovered the particulars in which it differed from the agreement, he was held entitled to repudiate the written contract in so far as it conflicted with the understanding between the parties.<sup>383</sup> And so, though a party can read and fails to read a paper offered him for signature, being a release of damages, it may be an excuse that the defendant told him it was merely a receipt and that it was too dark in the room to see to read.<sup>384</sup>

**§ 56. Same; Misrepresenting Purport or Contents of Instrument.**—If a person is induced to sign a contract, conveyance, or other instrument without reading it, by the fraudulent misrepresentations of the other party as to its character or contents, and in reliance on such representations, he may repudiate it on discovering that it is not the kind of instrument which he intended to execute or that it contains stipulations to which he never agreed, notwithstanding the fact that he might have discovered the fraud by scrutinizing the instrument, and though he is to some extent chargeable with negligence for his failure to do so.<sup>385</sup>

<sup>381</sup> *Palo Alto Stock Farm v. Brooker*, 131 Iowa, 229, 108 N. W. 307.

<sup>382</sup> *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170.

<sup>383</sup> *Lilienthal v. Herren*, 42 Wash. 209, 84 Pac. 829.

<sup>384</sup> *Robertson v. George A. Fuller Const. Co.*, 115 Mo. App. 456, 92 S. W. 130.

<sup>385</sup> *Capital Security Co. v. Holland*, 6 Ala. App. 197, 60 South. 495; *Moline Jewelry Co. v. Crew*, 171 Ala. 415, 55 South. 144;

Thus, where the parties have negotiated concerning a business transaction and reached an oral agreement, and one of them undertakes to reduce it to writing, and brings to the other for his signature a paper which he falsely represents as embodying the agreement, whereas it is of a different character or contains different provisions, and the other, relying on such representations, signs the contract without reading it, it is a fraud justifying the rescission of the contract.<sup>386</sup> For an even stronger reason, a person may have relief who is tricked into signing an instrument of an entirely different character than that which it is represented to him to be,<sup>387</sup> as, where a quitclaim deed is falsely pretended to be a receipt for a payment of money then made,<sup>388</sup> or where the signer is told that the document is a paper relating to his application for a pension, whereas it is a deed of land,<sup>389</sup> or where the document signed grants a right of

*Prestwood v. Carlton*, 162 Ala. 327, 50 South. 254; *Patapsco Shoe Co. v. Bankston*, 10 Ga. App. 675, 74 S. E. 60; *Pictorial Review Co. v. Fitzgibbon*, 163 Iowa, 644, 145 N. W. 315; *Alexander v. Brogley*, 62 N. J. Law, 584, 41 Atl. 691; *Dunston Lithograph Co. v. Borgo*, 84 N. J. Law, 623, 87 Atl. 334; *Leszynsky v. Ross*, 35 Misc. Rep. 652, 72 N. Y. Supp. 352; *Baldwin v. Postal Telegraph Cable Co.*, 78 S. C. 419, 59 S. E. 67; *Charleston & W. C. Ry. Co. v. Devlin*, 85 S. C. 128, 67 S. E. 149. But see *J. I. Case Threshing Mach. Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *Terry v. Mutual Life Ins. Co.*, 116 Ala. 242, 22 South. 532. See, also, *Stern v. Moneyweight Scale Co.*, 42 App. D. C. 162; *Great Northern Mfg. Co. v. Brown*, 113 Me. 51, 92 Atl. 993; *Hammel v. Benton* (Tex. Civ. App.) 162 S. W. 34.

<sup>386</sup> *Colorado Inv. Loan Co. v. Beuchat*, 48 Colo. 494, 111 Pac. 61; *McBride v. Macon Tel. Pub. Co.*, 102 Ga. 422, 30 S. E. 999; *Burlington Lumber Co. v. Evans Lumber Co.*, 100 Iowa, 469, 69 N. W. 558; *Germer v. Gambill*, 140 Ky. 469, 131 S. W. 268; *Griffin v. Roanoke R. & Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463. But where a written contract expressly stated that it included all of the agreements between the parties, it was held that one who signed it without ascertaining its terms, relying on the other party's statement that a collateral agreement was contained therein, could not avoid it unless his signature was procured by fraud. *Outcult Advertising Co. v. Barnes*, 176 Mo. App. 307, 162 S. W. 631.

<sup>387</sup> *Moore v. Sawyer* (C. C.) 167 Fed. 826; *Carter v. Walden*, 136 Ga. 700, 71 S. E. 1047; *Webb v. Webb*, 99 Miss. 234, 54 South. 840; *Acme Food Co. v. Older*, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807. See *Harrington v. Clafin*, 28 Tex. Civ. App. 100, 66 S. W. 898.

<sup>388</sup> *Kemery v. Zeigler*, 176 Ind. 660, 96 N. E. 950.

<sup>389</sup> *Johnson v. Hall*, 87 Miss. 667, 40 South. 1.

way over his lands to a telephone company, but is represented to him as being a receipt for a trifling sum of money,<sup>390</sup> or where one who has read and executed a lease of his premises is induced to sign another paper, really a deed of the leased premises, by the representation that it is merely a duplicate of the lease.<sup>391</sup> So also the rule applies where fraud is practised to induce the party to sign a paper which is genuine, in the sense of being the kind of instrument he meant to execute, but which is covertly made to include more land than he intended to convey,<sup>392</sup> or, in the case of a lease, a promise to pay the lessor a sum in cash (not originally agreed to) in addition to the agreed rent.<sup>393</sup> Relief will also be granted in the case of the fraudulent substitution of one instrument for another, that is to say, where an instrument embodying what the parties have agreed on is shown to one of them and read and approved by him, but, at the moment of his signing it, another instrument of an entirely different character is secretly substituted for it.<sup>394</sup> A device somewhat similar to this was disclosed in an early case in Virginia, where a grantor, desiring to settle certain property on her niece free from the control of her husband, requested a third person to prepare the deed. The husband handed to such third person a deed prepared for signature, stating that the grantor approved of it, and on such third person bringing this deed to the grantor, she executed it under the belief that it conformed to the directions she had given. But in reality it gave the husband an interest in the property. It was held that the deed should be set aside for fraud.<sup>395</sup>

But although the rules above set forth are supported by a great and impressive body of authority, there are still

<sup>390</sup> *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115, 68 N. E. 153, 98 Am. St. Rep. 650.

<sup>391</sup> *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848.

<sup>392</sup> *Leonard v. Roebuck*, 152 Ala. 312, 44 South. 390.

<sup>393</sup> *Schroeter v. Bowdon*, 53 Tex. Civ. App. 135, 115 S. W. 331.

<sup>394</sup> *Glvan v. Masterson*, 152 Ind. 127, 51 N. E. 237; *Togni v. Taminelli*, 11 Cal. App. 7, 103 Pac. 899; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848.

<sup>395</sup> *Shepherd v. Henderson*, 3 Grat. (Va.) 367.

many very respectable decisions which lay a predominating weight on the negligence or improvidence of a person who signs a business paper without reading it. According to these authorities, a person who can read and understand a paper presented for his signature and has an opportunity to do so, and is not prevented or dissuaded from doing so, is bound to acquaint himself with its contents, in the absence of any special circumstances excusing him from reading it. And if he does not read it, he is chargeable with such negligence as will estop him from pleading fraud. And although the purport or contents of the instrument may have been misrepresented to him, still, as he had no right to rely on such representations, they do not constitute fraud in law.<sup>396</sup> More especially is this rule applied where his attention was called to the necessity of perusing the document, as, for instance, by a warning printed in bold type not to sign without reading.<sup>397</sup> But even in these cases there may be special circumstances which will suffice to excuse the party's failure to read the document, as, where the misrepresentations were made for the very purpose of inducing him to refrain from reading it,<sup>398</sup> where a fiduciary relation existed between the parties, such as that of husband and wife,<sup>399</sup> or principal and agent,<sup>400</sup> or where, for any special reason, the one party imposed implicit trust and confidence in the other,<sup>401</sup> or where the party defrauded was ignorant, illiterate, or easily deceived,<sup>402</sup> or was under such

<sup>396</sup> *Heck v. Missouri Pac. Ry. Co.* (C. O.) 147 Fed. 775; *Toledo Computing Scale Co. v. Garrison*, 28 App. D. C. 243; *Kimmell v. Skelly*, 130 Cal. 555, 62 Pac. 1067; *Shores-Mueller Co. v. Lonning*, 159 Iowa, 95, 140 N. W. 197; *Magee v. Verity*, 97 Mo. App. 486, 71 S. W. 472; *Johnston v. Covenant Mut. Life Ins. Co.*, 93 Mo. App. 580; *McNinch v. Northwest Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Farlow v. Chambers*, 21 S. D. 128, 110 N. W. 94; *Hubenthal v. Spokane & I. Ry. Co.*, 43 Wash. 677, 86 Pac. 955.

<sup>397</sup> *Zeller v. Ranson*, 140 Mo. App. 220, 123 S. W. 1016.

<sup>398</sup> *Lotter v. Knospe*, 144 Wis. 426, 129 N. W. 614.

<sup>399</sup> *Loewenberg v. Glover*, 19 Wash. 544, 53 Pac. 839. And see, *supra*, § 47.

<sup>400</sup> *Robinson v. Glass*, 94 Ind. 211. And see, *supra*, § 42.

<sup>401</sup> *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Cooper v. Lee*, 1 Tex. Civ. App. 9, 21 S. W. 998; *Oar v. Davis* (Tex. Civ. App.) 135 S. W. 710.

<sup>402</sup> *Ballouz v. Higgins*, 61 W. Va. 68, 56 S. E. 184; *Carter v. Walden*, 136 Ga. 700, 71 S. E. 1047.

physical or mental pain or distress as to be incapable of judging of the necessary precautions to be taken against fraud.<sup>403</sup>

On the other hand, many courts have felt the doctrine of negligence precluding relief, as thus applied, to be extremely harsh. To visit a perfectly innocent person with severe consequences simply because of his mistaken trustfulness is too much like enforcing a forfeiture, and scarcely seems consistent with the beneficent purposes for which the jurisdiction in equity was established. And on the other hand, it is revolting to the conscience to permit a trickster to retain the fruits of his iniquity simply because his victim was too guileless to suspect him, or too unsophisticated to catch him in the fraud. Accordingly, many of the later cases have boldly taken the position that the doctrine that a party is conclusively presumed to know the contents of an instrument signed by him shall not and does not obtain as against fraud practised upon him, and that, contrary to the older rule, the principle should be that one who perpetrates a fraud is estopped to claim that the party defrauded ought not to have believed or trusted him, or could have detected the fraud by proper vigilance.<sup>404</sup> But finally, it should be observed that if the person claiming to have been defrauded is shown to have read the document before he signed it, and it appears that nothing contained in it was concealed from him, evidence merely that he was misled as to its meaning is not sufficient to justify a finding that he was induced by fraud to execute it.<sup>405</sup>

§ 57. **Misreading Instrument.**—Where one of the parties to a contract undertakes to read it to the other, in order

<sup>403</sup> *Porter v. United Railways Co.*, 165 Mo. App. 619, 148 S. W. 162.

<sup>404</sup> *Vaillancourt v. Grand Trunk Ry. Co.*, 82 Vt. 416, 74 Atl. 99; *Tanton v. Martin*, 80 Kan. 22, 101 Pac. 461; *Electrical Audit & Rebate Co. v. Greenberg*, 56 Misc. Rep. 514, 107 N. Y. Supp. 110; *M. E. Smith & Co. v. Kimble*, 31 S. D. 18, 139 N. W. 348; *McCaskey Register Co. v. Bennett*, 6 Ala. App. 185, 60 South. 541; *McCarty v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426; *Hough Cash Register Co. v. Mowry*, 35 App. Div. 631, 55 N. Y. Supp. 1141; *Frank V. Strauss & Co. v. Welsbach Gas Lamp Co.*, 42 Misc. Rep. 184, 85 N. Y. Supp. 367.

<sup>405</sup> *Nesbit v. Jencks*, 81 App. Div. 140, 80 N. Y. Supp. 1085.



that the other may thereupon execute it, it is his duty to read it with scrupulous accuracy; and if he misreads it intentionally, either by changing the words, by omitting material provisions, or by pretending to read what is not in the contract, and thereupon the other signs in reliance upon such reading, it is a fraud which will justify the repudiation of the contract or relief in equity.<sup>406</sup> "Fraud in the execution of an instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence."<sup>407</sup> But still the question arises whether a person who signs a document without reading it is justified in relying implicitly upon the fidelity with which the other party may have read it to him. There is authority for the statement that he is not to be charged with negligence in this case,<sup>408</sup> and the fact that a majority of the cases dealing with the general rule make no mention of this circumstance warrants the inference that it was considered unimportant, in the face of such a positive and actual fraud, that the injured person might have protected himself by insisting on reading the document himself. But of course a stronger case in law is made if there was any sufficient reason why he did not or could not inform himself at first hand of the contents of the instrument, as, for example, where he

<sup>406</sup> *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605; *American Fine Art Co. v. Reeves Pulley Co.*, 127 Fed. 808, 62 C. C. A. 488; *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198; *Papke v. G. H. Hammond Co.*, 192 Ill. 631, 61 N. E. 910; *Indiana, D. & W. Ry. Co. v. Fowler*, 103 Ill. App. 565; *Heltsman v. Windahl*, 125 Iowa, 207, 100 N. W. 1118; *Shores-Mueller Co. v. Lonning*, 159 Iowa, 95, 140 N. W. 197; *Western Mfg. Co. v. Cotton*, 31 Ky. Law Rep. 1130, 104 S. W. 758, 12 L. R. A. (N. S.) 427; *Van Deusen v. Brown*, 167 Mich. 49, 132 N. W. 472; *Monnett v. Columbus, S. & H. Ry. Co.*, 26 Ohio Cir. Ct. R. 469; *Fine v. Stuart* (Tenn. Ch. App.) 48 S. W. 371; *Harrison v. Middleton*, 11 Grat. (Va.) 527.

<sup>407</sup> *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605.

<sup>408</sup> *Tait v. Locke*, 130 Mo. App. 273, 109 S. W. 105. And see what is said in the next preceding section on the modern doctrine of excluding the question of negligence when an actual fraud is pleaded as a ground for relief.



was illiterate and could not read,<sup>409</sup> or where he could not read without the aid of spectacles and did not have them with him at the time,<sup>410</sup> or where he was too infirm to read the paper himself,<sup>411</sup> or where he relied on the reading and expounding of it by his own attorney.<sup>412</sup>

§ 58. **Fraudulent Concealment of Material Facts.**—Fraud justifying the rescission of an obligation may be committed not only by “*suggestio falsi*” but also by “*suppressio veri*,” that is to say, not only by the representation of that which is false, but also by the suppression or concealment of that which is true. A contract or other transaction may be avoided on the ground of that kind of deceit which exists where one party obtains the consent of the other to the agreement by means of concealing or omitting to state material facts with intent to deceive, by reason of which omission or concealment the other party is induced to give a consent which he would not otherwise have given, provided that the one was bound in good faith to disclose his knowledge to the other.<sup>413</sup> This is not only the rule of

<sup>409</sup> *Sibley v. Holcomb*, 104 Ky. 670, 47 S. W. 765; *Skym v. Weske Consolidated Co.*, 115 Cal. xvii, 47 Pac. 116; *Birdsall v. Coon*, 157 Mo. App. 439, 139 S. W. 243.

<sup>410</sup> *Bixler v. Hellman*, 44 Pa. Super. Ct. 603; *Stewart v. Roberts*, 33 Ky. Law Rep. 332, 110 S. W. 340; *Loucks v. Taylor*, 23 Ind. App. 245, 55 N. E. 238.

<sup>411</sup> *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716.

<sup>412</sup> *Nicol v. Young*, 68 Mo. App. 448.

<sup>413</sup> *Strong v. Replde*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853; *Stewart v. Wyoming Cattle Ranch Co.*, 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; *Edward Malley Co. v. Button*, 77 Conn. 571, 60 Atl. 125; *Rutherford v. Irby*, 1 Ga. App. 499, 57 S. E. 927; *Dickinson v. Stevenson*, 142 Iowa, 567, 120 N. W. 324; *Howerton v. Augustine*, 130 Iowa, 389, 106 N. W. 941; *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Witham v. Walsh*, 156 Mich. 582, 121 N. W. 309; *Decker v. Diemer*, 229 Mo. 296, 129 S. W. 936; *Owens v. Rector*, 44 Mo. 389; *Morley v. Harrah*, 167 Mo. 74, 66 S. W. 942; *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Moore v. Mutual Reserve Fund Life Ass'n*, 121 App. Div. 335, 106 N. Y. Supp. 255; *Miller v. Wissert*, 38 Okl. 808, 134 Pac. 62; *White v. Cox*, 3 Hayw. (Tenn.) 79; *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811; *Mannel v. Shafer*, 135 Wis. 241, 115 N. W. 801. And see *Corry v. Sylvia y Cia (Ala.)* 68 South. 891; *Stotts v. Fairfield*, 163 Iowa, 726, 145 N. W. 61; *Bolleau v. Records*, 165 Iowa, 134, 144 N. W. 336; *Linton v. Sheldon*, 98 Neb. 834, 154 N. W. 724; *Deyo v. Hudson*,

the common law, but in those states where the substantive law has been codified it has been re-enacted in the codes, and the essential elements of the rule clearly set forth and described.<sup>414</sup>

A fraudulent concealment, it is said, is the intentional concealment of some fact known to the defendant which it is material for the plaintiff to know to prevent being defrauded, the concealment of a fact which one is bound to disclose being the equivalent of an indirect representation that such fact does not exist, and differing from a direct false statement only in the mode in which it is made.<sup>415</sup> In another case, it is said that a fraudulent concealment is the failure to disclose a material fact, which the seller knows himself, which he has a right to presume that the

89 Misc. Rep. 525, 153 N. Y. Supp. 693; *Ford & Denning v. Shepard Co.*, 36 R. I. 497, 90 Atl. 805.

<sup>414</sup> "Concealment of material facts may in itself amount to fraud (1) when direct inquiry is made and the truth evaded, (2) when from any reason one party has a right to expect full communication of the facts from the other, (3) when one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silence, (4) when the concealment is of intrinsic qualities of the article which the other party, by the exercise of ordinary prudence and care, could not discover." Civ. Code Ga. 1910, § 4114. "Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or from the particular circumstances of the case." Code Ala. 1907, § 4299. "Actual fraud consists of any of the following acts, committed by a party to the contract or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract \* \* \* the suppression of that which is true by one having knowledge or belief of the fact." Civ. Code Cal., § 1572; Rev. Civ. Code Mont., § 4978; Rev. Civ. Code N. Dak., § 5293; Rev. Civ. Code S. Dak., § 1201; Rev. Laws Okl., 1910, § 903. And it may be remarked that, in the five states last mentioned, by other provisions of their codes, a deceit is defined, for the purposes of the statutory action of deceit, as being, among other things, "the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." And in Louisiana, fraud "must be caused or continued by artifice, by which is meant either an assertion of what is false or a suppression of what is true," in relation to a material part of the contract. Rev. Civ. Code La., § 1847.

<sup>415</sup> *T. C. Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950. And see *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172.

person with whom he is dealing is ignorant of, and of the existence of which the other party cannot by ordinary diligence inform himself. That it may furnish a sufficient cause of action, the fact suppressed must not only be material, but the materiality must either be known to the seller, or the facts must so constitute an element of the value of the contract as to authorize the inference of knowledge of its materiality. The concealment must be for the purpose of continuing a false impression or delusion under which the purchaser has fallen, or of suppressing inquiry, and thereby effecting a sale, with the intention to conceal or suppress, and it must operate as an inducement to the contract.<sup>416</sup> A fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with intent to defraud.<sup>417</sup>

The saying that "silence gives consent" may therefore be as correct in law as it is in morals; and keeping silence may in some circumstances be as active a misrepresentation as the most positive assertion.<sup>418</sup> But on the other hand, mere silence, in the absence of any duty to speak, is not actionable fraud.<sup>419</sup> Hence it will be seen that the question of responsibility for concealment depends entirely upon the circumstances which may or may not impose upon the party a legal duty to disclose the facts within his knowledge. This subject will be fully discussed in the succeeding sections.<sup>420</sup>

As instances of fraudulent concealment justifying rescission or relief in equity, we may mention the case where a seller of property conceals the fact that there is a mortgage upon it,<sup>421</sup> or where the holder of a promissory note, ne-

<sup>416</sup> *Jordan v. Pickett*, 78 Ala. 331.

<sup>417</sup> *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

<sup>418</sup> *Bawden v. Taylor*, 166 Ill. App. 443.

<sup>419</sup> *Boileau v. Records*, 165 Iowa, 134, 144 N. W. 336.

<sup>420</sup> See, *infra*, §§ 59-62. And see *Strong v. Repide*, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853.

<sup>421</sup> *Junkins v. Simpson*, 14 Me. 364; *Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623; *Elliott v. Clark* (Tex. Civ. App.) 157 S. W. 437.

gotiating its sale to another, conceals his knowledge of the insolvency of the maker,<sup>422</sup> or where the assignee of a bond, after he knew that the bond had been paid and discharged before its assignment to him, obtained a new bond from the surety by threatening suit, hiding the important fact of the payment, which was unknown to the surety.<sup>423</sup> So, where one sold a lease and carefully concealed the fact, which he well knew, that the lease had already been forfeited in consequence of a breach of covenant by the lessee, and the purchaser bought the lease in ignorance of this fact, it was held that the seller was responsible in damages as for a deceit.<sup>424</sup> Again, a credit insurance policy may be rescinded for fraudulent concealment of the insolvency of a customer.<sup>425</sup> And a fraudulent attempt to sell a defective or imperfect title to land, or concealment of defects in the title, will warrant a repudiation of the bargain.<sup>426</sup> So, where a person sells land and conceals the fact that he had previously conveyed the coal under it to another person (though the latter deed is on record), the purchaser, on discovering the fraud, may rescind the contract.<sup>427</sup> And a similar ruling was made in a case where, pending negotiations for a known body of coal land supposed to contain 300 acres, the vendor conveyed to his children some of the more desirable or valuable portions, reducing the whole to less than 200 acres, and concealed this fact from the purchaser until after the execution of the deed.<sup>428</sup> And where a mercantile company contracted to assume the indebtedness of a third person, being induced thereto by a fraudulent concealment of its extent, it was considered that it had an option, on discovering the fraud, to affirm or repudiate the contract.<sup>429</sup> In another case, one purchased a judgment

<sup>422</sup> *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151.

<sup>423</sup> *Thigpen v. Balfour*, 6 N. C. 242.

<sup>424</sup> *Stevens v. Adamson*, 2 Stark. 422.

<sup>425</sup> *American Credit-Indemnity Co. v. Wimpfheimer*, 14 App. Div. 498, 43 N. Y. Supp. 909.

<sup>426</sup> *Kronfeld v. Missal*, 87 Conn. 491, 89 Atl. 95. And see, *infra*, §§ 427-436.

<sup>427</sup> *Vernam v. Wilson*, 31 Pa. Super. Ct. 257.

<sup>428</sup> *Carney v. Harbert*, 44 W. Va. 30, 28 S. E. 712.

<sup>429</sup> *Hargadine-McKittick Dry-Goods Co. v. Swofford Bros. Dry-Goods Co.*, 10 Kan. App. 198, 63 Pac. 281.

against a deceased debtor for a trifling sum, the seller, who was not the original judgment creditor, but a receiver of a bank, supposing the judgment to be worthless and being unaware of the existence of valuable collateral security for the judgment, which fact the purchaser had discovered but did not communicate. This was held to be a fraudulent concealment justifying rescission.<sup>480</sup> On the same principle, in prospectuses and other literature inviting the public to subscribe for corporate stock, as also in accounts given verbally to subscribers, the suppression or concealment of material facts, such as, if known, would discourage or repel investors, is as much a fraud as willful misstatements of facts, and will equally entitle subscribers to cancel their contracts.<sup>481</sup> Thus, a person may so cancel his subscription where the person soliciting it, to induce him to give it, represented that a person named, who was well known in the community as a successful business man of wide experience and capacity, and whose example in such a matter would be likely to influence others, had subscribed for a large amount of the stock, but without disclosing the fact that such stock was given to such person as a gratuity for the use of his name.<sup>482</sup>

The same rules apply to the contract to marry. Persons contemplating a matrimonial engagement are not bound to volunteer information to each other on all points relating to their character and antecedents, and mere silence on the part of one, without any inquiry by the other, will not constitute fraud, though resulting in the concealment of matters which would have prevented the engagement if known. But a partial and fragmentary disclosure, accompanied by the willful concealment of material and qualifying facts will be as much a fraud as an actual misrepresentation. Hence, for instance, where a woman about to marry told her intended husband that she had been mar-

<sup>480</sup> *Files v. Rankin*, 153 Fed. 537, 82 C. C. A. 491.

<sup>481</sup> *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 113; *Oakes v. Turquand*, L. R. 2 H. L. 325, 342; *New Brunswick & Canada Ry. & Land Co. v. Muggeridge*, 1 Dr. & Sm. 363; *Stewart v. Joyce*, 201 Mass. 301, 87 N. E. 613.

<sup>482</sup> *Coles v. Kennedy*, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 508.

ried and had obtained a divorce from her husband, but failed to state that her husband had procured a divorce from her on a cross-bill in the same action, which charged her with being a woman of violent temper and with cruelty, it was held to be a fraudulent concealment and a good defense to an action for breach of promise of marriage.<sup>483</sup> In another case, it appeared that one applied for a policy of life insurance, and the application stipulated that the insurance should not take effect "until the first premium shall have been paid during my continuance in good health." Shortly afterwards the insured became suddenly ill with appendicitis, and the next day his secretary paid the premium to the agent of the insurance company and received the policy, concealing the fact of the illness. Two days later the insured died. It was held that the company could sue in equity for the cancellation of the policy.<sup>484</sup>

But in all cases of fraudulent concealment, it is distinctly and fundamentally necessary that the fact or circumstance concealed should have been material to the contract or obligation, that is, of such a nature, or having such a relation to the subject-matter, that it may fairly be presumed that the party deceived would not have entered into the engagement at all if the fact had been disclosed to him instead of being hidden. Without this the fraud is not of such a nature as to entitle him to relief.<sup>485</sup>

**§ 59. Same; Circumstances Imposing Duty to Disclose.** To justify the rescission of a contract on the ground of a fraudulent concealment, there must have been a willful suppression of such facts in regard to the subject-matter as the party making it is bound to disclose.<sup>486</sup> This obligation to disclose may arise from various circumstances. In the

<sup>483</sup> *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373.

<sup>484</sup> *Mutual Life Ins. Co. v. Pearson* (C. C.) 114 Fed. 395.

<sup>485</sup> *Jordan v. Pickett*, 78 Ala. 331; *T. C. Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Brown v. Strimple*, 21 Mo. App. 338; *Recknagel v. Steinway*, 33 Misc. Rep. 633, 68 N. Y. Supp. 957; *Lafayette Street Church Society v. Norton*, 159 App. Div. 1, 144 N. Y. Supp. 265.

<sup>486</sup> *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *Stotts v. Fairfield*, 163 Iowa, 726, 145 N. W. 61.

first place, if a direct inquiry is addressed to a party having knowledge, in such a manner as to show that the inquirer means to accept the information which he may give him and rely upon it, and that the fact inquired about has an important or essential bearing on the making of the contract, it is his duty, if he answers at all, to answer not only truly but fully, and if he disclaims all knowledge of the fact, evades the truth, or gives a misleading reply, it is a fraudulent concealment for which the injured party may have redress.<sup>487</sup> In the next place, if one of the parties to the transaction occupies a fiduciary or confidential relation to the other (as in the case of attorney and client, principal and agent, guardian and ward, parent and child, or the like), it is the right of the one to rely implicitly upon the good faith of the other, with a corresponding obligation to exercise the utmost degree of fairness in all dealings between them.<sup>488</sup> And this involves a full and frank disclosure of all material facts within the knowledge of the fiduciary or trustee. He cannot safely deal with the other party on any other terms. He is bound not only to answer fully all inquiries addressed to him, but to volunteer information if necessary, in respect to every material matter of which he knows the other party to be ignorant, until that other is completely advised of all circumstances which may properly influence his decision. And though the fiduciary may do nothing to deceive or mislead the other, yet if he intentionally keeps back or conceals any material matter within his knowledge, it is a constructive fraud and will warrant the rescission or setting aside of the resulting contract or bargain.<sup>489</sup> Thus, where an attorney sells property to his

<sup>487</sup> *James v. Crosthwait*, 97 Ga. 673, 25 S. E. 754, 36 L. R. A. 631; *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373; *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283; *Civ. Code Ga.* 1910, § 4114. Compare *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251. See *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 South. 1015.

<sup>488</sup> See, *supra*, § 40 et seq.

<sup>489</sup> *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Beam v. Macomber*, 33 Mich. 127; *Bonz v. Bonz*, 165 Mich. 45, 130 N. W. 306; *Noban v. Shoup*, 171 Mich. 191, 137 N. W. 75; *Lafayette Street Church Society v. Norton* (Sup.) 133 N. Y. Supp. 671; *American Credit Indemnity Co. v.*



client, the latter may be entitled to rescind the transaction on account of concealments by the former which would not have given any such right but for the confidential relation of the parties.<sup>440</sup> So, where an agent for the sale of land represented to his principal that the land had been sold for taxes (which was correct) and that the principal no longer had any interest in it, and thereby obtained a quitclaim deed for a small consideration, but withheld from the principal the fact which he well knew himself, that the tax sale was void, it was held that the deed was voidable at the option of the principal.<sup>441</sup>

In the next place, the rule applies where the parties do not stand upon an equal footing as respects knowledge of the subject-matter or the means of acquiring information. Where one of the parties conceals a fact material to the transaction which is exclusively or peculiarly within his own knowledge, being aware that the other party is acting on the belief that no such fact exists, it is not a mere justifiable silence, but the violation of an actual duty to disclose, and therefore is as much a fraud as if the existence of that fact were expressly denied or the reverse of it expressly affirmed.<sup>442</sup> Thus, for instance, one who sells personal property, knowing that he has no title to it and concealing that fact from the purchaser, is liable for the fraud.<sup>443</sup> So again, where a machine sold is a scientific device, and the seller knows all about it, but the purchaser is unfamiliar with it, and is therefore compelled to rely on what the seller may tell him about it, it is the duty of the seller to inform the purchaser of all material facts of purely scientific cognizance (that is, all such facts as the buyer

Wimpfheimer, 14 App. Div. 498, 43 N. Y. Supp. 909; *Boren v. Boren*, 38 Tex. Civ. App. 139, 85 S. W. 48; Code Ala. 1907, § 4299.

<sup>440</sup> *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000.

<sup>441</sup> *Cantwell v. Nunn*, 45 Wash. 536, 88 Pac. 1023.

<sup>442</sup> *Thomas v. Murphy*, 87 Minn. 358, 91 N. W. 1097; *Barrett v. Lewiston, B. & B. St. Ry. Co.*, 110 Me. 24, 85 Atl. 306; *Morgan v. Hodge*, 145 Wis. 143, 129 N. W. 1083. See *Rosenbaum v. United States Credit System Co.*, 64 N. J. Law, 34, 44 Atl. 966; *Id.*, 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; *Bullock v. Crutcher* (Tex. Civ. App.) 180 S. W. 940.

<sup>443</sup> *Jarrett v. Goodnow*, 39 W. Va. 602, 20 S. E. 575, 32 L. R. A. 321.



cannot discover from his own unaided inspection), and the concealment of any such fact is fraudulent.<sup>444</sup> And even though the matter in hand does not involve any trained skill or technical knowledge, yet it is a fraud to conceal material facts where the matter is not equally open to the investigation of both parties,<sup>445</sup> or at least, where the damaging circumstance is not within the reach of ordinary observation or could not have been discovered by the other party in the exercise of ordinary prudence and care.<sup>446</sup> Thus, it is a rule that if the lessor of premises has knowledge of defects in the premises, which are not discoverable by the tenant, and which will imperil his person or property, a liability arises from the fraudulent concealment thereof.<sup>447</sup> So, in another case, the plaintiff sold to defendant certain tailing mills, with the right to operate them in mining dumps which were supposed to contain lead and zinc ores. The plaintiff knew that the dumps were of no value and that the mills could not be operated at a profit, and also knew that defendant relied on his representation to the contrary. It was held to be the plaintiff's duty to disclose truthfully his knowledge of the entire matter, and a fraud to conceal it, and this, although no special skill was necessary to discover the worthless condition of the property.<sup>448</sup> And finally, if the seller of personal property knows that the buyer is purchasing it for a specific use, and is aware of any defect which would unfit it for that particular use, it is his duty to disclose his knowledge on the point, and the concealment of it is fraudulent.<sup>449</sup>

§ 60. Same; When Silence is Justifiable.—Where persons deal with each other at arms' length,—that is to say, where there is no relation of trust or confidence between them, but each is supposed to be on his guard against the

<sup>444</sup> *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067.

<sup>445</sup> *White v. Walker*, 5 Fla. 478; *Seal v. Holcomb*, 48 Tex. Civ. App. 330, 107 S. W. 916.

<sup>446</sup> *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Boyer v. State*, 169 Ind. 691, 83 N. E. 350; Civ. Code Ga. 1910, § 4114.

<sup>447</sup> *Shinkle, Wilson & Kreis Co. v. Birney*, 68 Ohio St. 328, 67 N. E. 715.

<sup>448</sup> *Evans v. Palmer*, 137 Iowa, 425, 114 N. W. 912.

<sup>449</sup> *Grojean v. Darby*, 135 Mo. App. 586, 116 S. W. 1062.

other,—and no direct inquiries are made, and all the sources of information are equally open to both, so that each can, if he will, possess himself of all the knowledge possessed by the other, then there is no duty of disclosure resting on either party. And if one of them knows circumstances affecting the matter in hand of which the other is ignorant, it is an advantage of which he may legitimately avail himself, so that his mere silence or failure to volunteer information is not fraudulent, either actually or constructively.<sup>450</sup> For the “concealment” which the law denounces as fraudulent implies a purpose or design to hide facts which the other party ought in justice to know, and mere silence is not in itself concealment.<sup>451</sup> For example, although the owner of real estate may have determined to sell his property at a certain price, he is under no obligation to communicate that fact to a prospective purchaser, but may obtain a larger price if the purchaser is willing to pay it.<sup>452</sup> So a vendor of land is not bound (in the absence of inquiry) to communicate to the purchaser his knowledge that one of the boundaries is in question or dispute.<sup>453</sup> And the seller of bank stock is not liable to the buyer in an action of deceit merely because he failed to disclose the insolvent condition of the bank, when he had no connection with the bank, and no actual knowledge of its condition.<sup>454</sup> So, where the indorser of a note for the price of land allows the

<sup>450</sup> *Cherry v. Brizzolara*, 89 Ark. 309, 116 S. W. 668, 21 L. R. A. (N. S.) 508; *Bank of Newport v. Watson*, 71 Ark. 644, 74 S. W. 15; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Gamet v. Haas*, 165 Iowa, 565, 146 N. W. 465; *Boileau v. Records*, 165 Iowa, 134, 144 N. W. 336; *Ferguson-McKinney Dry-Goods Co. v. Grear*, 76 Kan. 164, 90 Pac. 770; *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1091; *Jones v. Stewart*, 62 Neb. 207, 87 N. W. 12; *Jones v. Commercial Travelers' Mut. Accident Ass'n*, 134 App. Div. 936, 118 N. Y. Supp. 1116; *Williams v. Hay*, 21 Misc. Rep. 73, 46 N. Y. Supp. 895; *Iron City Nat. Bank v. Du Puy*, 194 Pa. 205, 44 Atl. 1066; *Bishop v. Buckley*, 33 Pa. Super. Ct. 123; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Deyo v. Hudson*, 89 Misc. Rep. 525, 153 N. Y. Supp. 693.

<sup>451</sup> *Barrett v. Lewiston, B. & B. St. Ry. Co.*, 110 Me. 24, 85 Atl. 306; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384.

<sup>452</sup> *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410.

<sup>453</sup> *Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57.

<sup>454</sup> *Kirtley's Adm'x v. Shinkle*, 24 Ky. Law Rep. 608, 69 S. W. 723. And see *Gamet v. Haas*, 165 Iowa, 565, 146 N. W. 465.

contract of purchase to be made out in his name as security for his indorsement, and is fully informed of the nature of such contract, and of his liability in case of default of the purchaser, he is not entitled to rescission of the contract on the ground that an agreement between the vendor and the maker of the note for a discount to the latter on his procuring a purchaser was not disclosed.<sup>455</sup> Again, the fact that the seller did not inform the buyer that certain powders for use with a fumigating apparatus, the patent for which was the subject of the sale, contained sulphur, the use of which as a fruit preservative was forbidden by statute, does not constitute deceit or misrepresentation.<sup>456</sup> So, where the purchaser of a herd of dairy cows was a competent judge of such property and had full opportunity and ample time for inspection before the purchase, and a written contract of sale was made, which contained no express warranty, it was held that the rule of caveat emptor applied, and the purchaser was not entitled to rescind the contract on account of the diseased condition of some of the cows, in the absence of any actual fraud on the part of the seller.<sup>457</sup>

§ 61. **Caveat Emptor.**—The maxim “caveat emptor” (“let the buyer beware”) expresses a rule of the common law applicable to sales of property which implies that the buyer must not trust blindly that he will get value for his money, but must take care to examine and ascertain the kind and quality of the article he is purchasing, or, if he is unable to examine it fully or intelligently, or lacks the knowledge to judge accurately of its quality or value, to protect himself against possible loss by requiring an express warranty from the seller.<sup>458</sup> “According to the prin-

<sup>455</sup> *Spence v. Gellfuss*, 89 Wis. 499, 62 N. W. 529.

<sup>456</sup> *Smith v. Alphin*, 150 N. C. 425, 64 S. E. 210.

<sup>457</sup> *Dorsey v. Watkins* (C. C.) 151 Fed. 340.

<sup>458</sup> *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174; *Wright v. Hart*, 18 Wend. (N. Y.) 449; *Walsh v. Schmidt*, 206 Mass. 405, 92 N. E. 496, 34 L. R. A. (N. S.) 798; *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076; *Barnes-Smith Mercantile Co. v. Tate*, 156 Mo. App. 236, 137 S. W. 619; *Galbraith v. Wythe*, 2 N. C. 464; *Wilcox v. Calloway*, 1 Wash. (Va.) 38. See *Walker, Evans & Cogs-*

ciples of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of a particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales, the buyer has an opportunity of inspecting the article sold, and the seller, not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be in fact, in a particular case, any inequality, it is such that the law cannot and ought not to attempt to provide against it. Consequently the buyer in such cases, the seller giving no express warranty, and making no representations intended to mislead, is holden for the purchase entirely on his own judgment."<sup>459</sup>

But the rule or doctrine of *caveat emptor* should be invoked where it is necessary in order that the seller may not be deprived of his just rights, but will not be applied to assist him in getting or keeping that to which he is not entitled.<sup>460</sup> Therefore it has no application in cases of actual fraud. That is to say, with reference to our immediate subject, if the seller has perpetrated an actual fraud upon the purchaser, either by fraudulent misrepresentations or by the fraudulent concealment of facts which the circumstances made it his duty to disclose, the maxim *caveat emptor* has no application, and the seller cannot shelter himself behind the contention that the buyer ought to have been on his guard against fraud.<sup>461</sup> Mere silence is not

*well Co. v. Ayer*, 80 S. C. 292, 61 S. E. 557; *Baker v. Kamantowsky* (Mich.) 155 N. W. 430.

<sup>459</sup> *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 116, 3 Sup. Ct. 542, 28 L. Ed. 86. And see *Shackelford v. Fulton*, 139 Fed. 97, 71 C. C. A. 295; *Hansen v. Baltimore Packing & Cold-Storage Co. (C. C.)* 86 Fed. 832; *Woods v. Nicholas*, 92 Kan. 258, 140 Pac. 862.

<sup>460</sup> *Tarnow v. Carmichael*, 82 Neb. 1, 116 N. W. 1031.

<sup>461</sup> *Kell v. Trenchard*, 142 Fed. 16, 73 C. C. A. 202; *Hennesy v. Damourette*, 15 Colo. App. 354, 62 Pac. 229; *Reval v. Miller*, 178 Ill. App. 208; *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Wolf v. Michael*, 21 Misc. Rep. 86, 46 N. Y. Supp. 991; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454. A seller cannot shelter himself behind this maxim when he discloses only one of several similar disadvantages. *Elsey v. Lamkin*, 156 Ky. 836, 162 S. W. 106.

fraudulent concealment, as we have already stated, where there is no duty to disclose. And this is the only proper case for the application of the maxim in question, that is to say, a case where the seller says nothing at all, is asked no questions, and is not legally bound to volunteer information. In such circumstances, common sense as well as common law requires the buyer to exercise and act on his own judgment. If no active concealment is practised by the seller in order to deceive, the buyer cannot allege fraud where he inspects what he purchases, and the defect is apparent, or where the thing purchased was open to his inspection, so that he could have ascertained the defect by the exercise of ordinary care and prudence.<sup>462</sup> But, on the other hand, the maxim does not obtain where the parties do not stand upon an equal footing as respects the means of judging the value and quality of the subject of sale. For instance, if the formation of a correct judgment on this point requires the exercise of scientific knowledge, technical training, or acquired skill, which the seller possess and the buyer does not possess, it becomes the duty of the former to disclose to the latter all that is material for him to know, and the failure to do so is a concealment in law which is fraudulent, and the doctrine of *caveat emptor* cannot be invoked.<sup>463</sup> But again, it may be that the parties do stand upon an equal footing in respect to knowledge, training, or skill, or even that the buyer may be the superior in this respect. Here the case is again reversed, and the maxim in question will have a just application. To illustrate, in one of the cases, the defendant purchased an ice plant, and was told that, with some repairs, it would manufacture a certain quantity of ice per day. But he knew that the previous owner had been unable to operate it successfully. Besides, he was a skilled machinist, and had ample facilities to ascertain the exact condition of the plant, and was offered

<sup>462</sup> *Long v. Duncan*, 14 Ky. Law Rep. 812. In *Boileau v. Records*, 165 Iowa, 134, 144 N. W. 336, the failure of vendors of land, held under a tax title, to inform the vendee that the prior owner (in possession) was insane, for which reason the tax title was afterwards set aside, was held not actionable fraud.

<sup>463</sup> *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067.

every opportunity to determine its condition and capacity before completing the purchase. In an action to recover the price, it was held that he was not entitled to set off damages arising from the alleged false representations, as the rule of caveat emptor applied.<sup>464</sup> And a similar decision was made in a case where the complainant sued for the rescission of a contract by which he had purchased a herd of cows, and alleged that they were infected with tuberculosis, but it appeared that there was no warranty of their soundness, and that the complainant was an experienced man in the dairy business and competent to judge of the condition of the cattle, and that he had full opportunity to inspect and examine them, and could have had tests made if he judged it necessary.<sup>465</sup>

**§ 62. Concealment Coupled with Efforts to Prevent Discovery.**—Even in those cases where one of the parties to a contract is legally justified in keeping silence in regard to damaging or discouraging facts within his knowledge, being under no duty to make a disclosure of them, still the other party must be allowed a fair opportunity to find out the truth for himself. Thus, while the seller of property may not be required to volunteer information concerning faults or drawbacks which are known to him, and which the buyer could and should discover by his own examination, and though the seller makes no representations whatever, true or false, yet if he employs any device, trick, or artifice to prevent the buyer from making such inspection or examination, or to render the inspection illusory, or to distract the buyer's attention from the real facts, his concealment becomes fraudulent, and will justify a rescission of the contract.<sup>466</sup> Thus, in an English case, the seller of

<sup>464</sup> *Williamson v. Holt*, 147 N. C. 515, 61 S. E. 384, 17 L. R. A. (N. S.) 240.

<sup>465</sup> *Dorsey v. Watkins* (C. C.) 151 Fed. 340.

<sup>466</sup> *Files v. Rankin*, 153 Fed. 537, 82 C. C. A. 491; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Tooker v. Alston*, 150 Fed. 599, 86 C. C. A. 425; *Mather v. Barnes* (C. C.) 146 Fed. 1000; *Roseman v. Canovan*, 43 Cal. 110; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Webster v. Bailey*, 31 Mich. 36; *Starkweather v. Benjamin*, 32 Mich. 305; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748,

a house, being aware of a defect in the main wall, plastered it up and covered it over with paper, so that the defect was not visible, and it was held that as he had not only concealed the fault, but done what he could to prevent its discovery, he was liable to the purchaser in an action for deceit.<sup>467</sup> A similar case, resulting in a like decision, was one in which the manufacturer of an implement having a wooden tongue constructed the latter of cross-grained wood, with a knot in it and a knothole, and plugged up the hole and by means of paint and putty concealed the defects.<sup>468</sup> In another case, defendant connected the sewer from his building with a pit in the rear thereof, and, having covered the pit with clay, built a residence over it, which he sold to the plaintiff, saying nothing about the pit or the sewer pipe. The pit was then nearly full of sewage, and the residence was uninhabitable because of the odor from it. It was held that the defendant was liable in damages to the plaintiff.<sup>469</sup> And a similar rule was applied in a case involving a settlement of the affairs of a partnership, where the plaintiff was offered a sum in discharge of his interest in the firm, and, to induce him to accept it, the defendants, his partners, pretended to submit the books and papers of the firm for his examination, but in reality kept back some of them and for the others substituted fictitious books and accounts.<sup>470</sup>

**§ 63. Concealment Coupled with False Representations.** Although the circumstances of a particular case may be such that one of the parties is warranted in keeping silence concerning a material fact within his knowledge and

Ann. Cas. 1912A, 399. But the concealment and the efforts to prevent discovery must have preceded the actual making of the contract. What is done afterwards, in the way of trying to prevent the purchaser from finding out that he has been defrauded, does not warrant the rescission of the sale. *Sleeking v. Litzler*, 31 Ind. 13.

<sup>467</sup> *Pickering v. Dowson*, 4 Taunt. 785.

<sup>468</sup> *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124.

<sup>469</sup> *Welkel v. Sterns*, 142 Ky. 513, 134 S. W. 908, 34 L. R. A. (N. S.) 1035.

<sup>470</sup> *Richards v. Farmers' & Merchants' Bank*, 7 Cal. App. 387, 94 Pac. 393.



which is unknown to the other party, yet if his concealment of it is accompanied by any false representations on his part, intended to deceive or mislead, it becomes fraudulent and furnishes ground for rescission or for relief in equity.<sup>471</sup> In the case which is usually cited as a typical example of this rule, it appeared that the owner of a flock of sheep had lost them and had practically given up the hope of recovering them. For this reason he sold them for a mere trifle to a person who made an offer. As a matter of fact, the sheep had already been found and had been advertised by the finder. The seller did not know this, but the buyer did. It was considered that this alone would not justify the rescission of the sale. But the buyer, in the course of the negotiation, had made the mistake of saying that he did not suppose the sheep would ever be found; and it was held that this was such a false statement, though a mere expression of opinion, as amounted to fraud, and would entitle the seller to recover his property.<sup>472</sup> For the same reason, it was held to be an actionable fraud where one made a written representation that his son was entitled to credit, concealing the fact that the son was a minor.<sup>473</sup> And while mere silence on the part of a sheriff as to the existence in his hands of a prior lien on property sold in his presence will not subject him to an action for deceit, yet if he does or says anything intended or calculated to mislead a purchaser in this respect, he is liable.<sup>474</sup> And it is an important part of this rule that if a person who is entitled to keep silent in regard to the subject of the contract volunteers any information at all, which may influence the decision of the other party, he is bound to disclose the whole truth, and a partial statement is a fraudulent concealment, though it may be true in itself, if it gives a false color to the whole, or if it purports to be the entire truth and yet involves the suppression of a material part.<sup>475</sup>

<sup>471</sup> *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315; *Garrett v. Slavens*, 129 Iowa, 107, 105 N. W. 369.

<sup>472</sup> *Bench v. Sheldon*, 14 Barb. (N. Y.) 66.

<sup>473</sup> *Kidney v. Stoddard*, 7 Metc. (Mass.) 252.

<sup>474</sup> *Wicker v. Worthy*, 51 N. C. 500.

<sup>475</sup> *Gidney v. Chappell*, 26 Okl. 737, 110 Pac. 1099.



§ 64. **Concealment of Latent Defects.**—A patent defect is one which is discoverable by mere inspection by a person of ordinary intelligence. A latent defect is one which is not discoverable at all, until its destructive effects become apparent, or which is not discoverable except by a test or by an inspection requiring technical knowledge or acquired skill to make it instructive. Ordinarily the buyer of personal property must take his chance of patent defects. It is his duty to inspect and examine the property for himself, and he is chargeable with knowledge of such facts as his inspection would disclose to him. But for the seller of property to conceal a latent defect, that is, merely to fail in his duty to state or describe it, when he is aware of its existence and knows that the buyer is ignorant of it and cannot see it, is fraudulent and warrants the rescission of the contract.<sup>476</sup> This is a case to which the rule of *caveat emptor* does not apply. "If the vendor is cognizant of any serious secret defect materially deteriorating the value of the goods in the market, and nevertheless offers them for sale at the ordinary market price, and knows that the purchaser is deceived by the appearance of the goods at the time of the sale, and is laboring under a gross delusion respecting them, and the vendor takes no trouble to rectify the mistake and disclose the real facts to the purchaser, he is responsible in damages for willful deceit."<sup>477</sup> Again, while it is true that the buyer is required to use his sight and intelligence for the discovery of patent defects, yet a defect is not patent in this sense, but is rather latent, if, the physical conditions being obvious, it still requires some special knowledge or skill to determine whether those conditions constitute or indicate a defect. Thus, the inferior quality of a given article may be apparent to the most casual glance of a person skilled in the production or use of

<sup>476</sup> *Boyer v. State*, 169 Ind. 691, 83 N. E. 350; *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Cecil v. Tutt*, 32 Mo. 463; *Stratton v. Dudding*, 164 Mo. App. 22, 147 S. W. 516; *Adkins v. Stewart*, 159 Ky. 218, 166 S. W. 984; *Morbrose Inv. Co. v. Flick*, 187 Mo. App. 528, 174 S. W. 189. Compare *Dayton v. Kidder*, 105 Ill. App. 107; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Jones v. Just*, L. R. 3 Q. B. 197.

<sup>477</sup> 2 Add. Torts (Wood's edn.) § 1205.

articles of that kind, whereas an unskilled person will see the same physical details, but will draw no conclusion from them. In such circumstances, as between a seller aware of the defect and a purchaser who is ignorant of it, it is a fraud for the former to conceal it.<sup>478</sup>

But it is necessary to bring this rule into play that the fault or defect should have existed at the time of the sale,<sup>479</sup> and further, that the seller should have known of its existence at that time.<sup>480</sup> As will be shown in another place, there are special rules governing sales by manufacturers of their own products, and sales of articles ordered for a special use or purpose.<sup>481</sup> But ordinarily, one who sells a finished product made or put together by himself, but made out of material which he bought and did not produce, is not responsible for the effects of latent defects in such material which he had not discovered for himself, as, for example, where he uses iron or steel in fashioning his goods, which he supposes to be of good quality, but which contains hidden flaws or imperfections.<sup>482</sup> Neither is the seller responsible as for fraud if he frankly tells the purchaser all that he himself knows about the hidden defect, or if he admits that the article is damaged or imperfect, and thereby puts the purchaser upon inquiry to ascertain its real and actual condition.<sup>483</sup> And again, notwithstanding the existence of a latent defect, the purchaser must abide by his bargain if he possesses the requisite technical knowledge or skill to detect it and makes his investigation and relies on his own judgment.<sup>484</sup>

<sup>478</sup> *Pinney v. Andrus*, 41 Vt. 631; *Thompson v. Botts*, 8 Mo. 710; *Puls v. Hornbeck*, 24 Okl. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202, 138 Am. St. Rep. 883.

<sup>479</sup> *Nelson v. Lillard*, 16 La. 336.

<sup>480</sup> *Puls v. Hornbeck*, 24 Okl. 288, 103 Pac. 665, 29 L. R. A. (N. S.) 202, 138 Am. St. Rep. 883.

<sup>481</sup> *Infra*, §§ 120, 189.

<sup>482</sup> *Bragg v. Morrill*, 49 Vt. 45, 24 Am. Rep. 102; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Cogel v. Kniseley*, 89 Ill. 598. See *Randall v. Newson*, L. R. 2 Q. B. Div. 102.

<sup>483</sup> *Grojean v. Darby*, 135 Mo. App. 586, 116 S. W. 1062; *Overhulser v. Peacock*, 148 Mo. App. 504, 128 S. W. 526.

<sup>484</sup> *Dorsey v. Watkins* (C. C.) 151 Fed. 340; *Quis v. Halloran*, 74 App. Div. 621, 77 N. Y. Supp. 196.

The main rule is frequently applied in the case of the sale of diseased animals. The buyer is required to exercise his own judgment and to make his own inspection, so far as regards any infirmities or deformities which are apparent to the eye, and any external symptoms of disease which would not escape the attention of a person of competent intelligence observing carefully. But it is fraudulent conduct, justifying relief, for a vendor to sell a horse or other animal having an internal malady of a secret character, and which will result in killing or disabling the animal, which is not apparent by any external indications, but which is known to the seller and known by him to be unknown to the buyer;<sup>485</sup> and this rule is said to apply more particularly when the seller of the animal knows that the buyer is purchasing it for a specific use, for which its defects unfit it.<sup>486</sup>

But of course the rule respecting latent defects has a much wider application than this. For example, it has been ruled that a vendor of a machine, which he knows to be dangerous because of concealed defects, is liable in damages to any person, including one not in privity of contract with him, who is injured by reason of his fraudulent concealment of the truth. And in the case in which this decision was made it was further held to be immaterial that the seller was not the maker of the machine. For neither the manufacturer of a machine nor one to whom he has sold it can sell the machine as sound and safe, knowing any fact

<sup>485</sup> *Fitzhugh v. Nirschl* (Or.) 151 Pac. 735; *Clearwater v. Forrest*, 72 Or. 312, 143 Pac. 998; *Schee v. Shore*, 6 Kan. App. 136, 50 Pac. 903; *Riggs v. Duperrier*, 19 La. 418; *Lemos v. Daubert*, 8 Rob. (La.) 224; *Michoud v. Marquet*, 4 La. Ann. 51; *Blondeau v. Gales*, 8 Mart. (La.) O. S. 313; *McAdams v. Cates*, 24 Mo. 223; *Palmer v. Cowle*, 27 Ohio Cir. Ct. R. 617; *Carter v. Cole* (Tex. Civ. App.) 42 S. W. 369; *Paddock v. Strobridge*, 29 Vt. 470. But compare *Court v. Snyder*, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247, where it is said that the mere fact that the seller is aware of a latent defect in an animal will not amount to fraud if he failed to disclose it, unless he made some statement or made use of some act or device calculated to deceive the buyer or induce him not to make the inquiry, but his mere silence is not such an act as will constitute fraud, and no warranty can be implied therefrom. And see *Howell v. Cowles*, 6 Grat. (Va.) 393.

<sup>486</sup> *Grojean v. Darby*, 135 Mo. App. 586, 116 S. W. 1062.

as to a concealed defect therein, intending it to be used by any one into whose hands it might come, when the consequence of such defect would naturally be an injury to the person so using it.<sup>487</sup> In another case, one leased a building for use as a theater. The city authorities had already directed the lessor to make certain changes in the building for the safety of the public. The lessee did not know this fact, and the lessor withheld all knowledge of it from him. No examination of the premises by the lessee would disclose the particular matters in respect to which the authorities had required changes to be made. The rule in respect to latent defects was applied, and it was held that the lessor was liable for failing to inform the lessee of the defects in the building, as measured by the requirements of the authorities.<sup>488</sup>

**§ 65. Acquiescence in Self-Deception of Other Party.—**There is strong authority in support of the proposition that a seller of goods may not take advantage of his discovery that the purchaser has deceived himself in regard to their quality or value. In other words, when the seller becomes aware that the purchaser has fallen into a mistake about the article in question, which is of such a nature as to make him offer or give a higher price than he otherwise would, it is fraudulent conduct to permit him to remain under that mistake and buy the article on the erroneous supposition, although the seller himself was not responsible for the mistake and did nothing to induce it.<sup>489</sup> But on the

<sup>487</sup> *Kuelling v. Roderick Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124; *Standard Sewing Mach. Co. v. New State Shirt & Overall Mfg. Co.*, 42 Okl. 554, 141 Pac. 1111.

<sup>488</sup> *Norris v. McFadden*, 159 Mich. 424, 124 N. W. 54.

<sup>489</sup> *Hill v. Gray*, 1 Stark. 434; *Shelton v. Ellis*, 70 Ga. 297; *Keller v. Equitable Fire Ins. Co.*, 28 Ind. 170; *Faxon v. Baldwin*, 136 Iowa, 519, 114 N. W. 40; *Degman v. Mason County*, 15 Ky. Law Rep. 876; *Phelps v. Jones*, 141 Mo. App. 223, 124 S. W. 1067; *Stewart v. Dunn*, 77 App. Div. 631, 79 N. Y. Supp. 123. It may be remarked that the Code of Georgia, which, in these matters, is supposed to be mainly declaratory of the common law, provides that "concealment of material facts may in itself amount to fraud \* \* \* when one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silence." Civ. Code Ga. 1910, § 4114.

other hand, an important English decision holds that, if the seller does nothing to induce the mistaken belief on the part of the purchaser, his mere passive acquiescence in the buyer's self-deception does not entitle the latter to rescind the sale, the court saying that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."<sup>490</sup> However this may be, it is clear that the vendor cannot escape the ordinary consequences of perpetrating a fraud if, perceiving that the buyer has deluded or deceived himself in regard to the article, he not only fails to apprise him of his mistake, but by any representation or by any artifice tries to continue or confirm the mistake or to add color and credence to it.<sup>491</sup> And it is said that, though a higher degree of good faith may be required in negotiations for a compromise and settlement where one of the parties is a surety, still this does not require the other party specially to call his attention to the bearing of facts known to both, or the inferences to be drawn therefrom.<sup>492</sup>

§ 66. **Concealment by Purchaser of Property.**—It is a reasonable and natural presumption that the owner of property, whether real or personal, has acquainted himself with all the circumstances affecting its character, title, or value. If he lacks the information necessary to enable him to deal with it advantageously, it is generally his own fault, and the ordinary purchaser (not occupying any fiduciary or confidential relation to him) is under no obligation to enlighten him. Accordingly, the rule is well settled and has been long established that no duty is imposed upon a purchaser, by the mere relation of vendor and vendee, to communicate to the seller information of which the latter is ignorant, relative to the character or value of the property

<sup>490</sup> *Smith v. Hughes*, L. R. 6 Q. B. 597. And see *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135.

<sup>491</sup> *Clark v. Clark*, 55 N. J. Eq. 814, 42 Atl. 98; *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, 61 S. E. 149; *Jordan v. Pickett*, 78 Ala. 331; *Cohen Bros. v. Missouri, K. & T. Ry. Co.*, 44 Tex. Civ. App. 381, 98 S. W. 437.

<sup>492</sup> *Daly v. Busk Tunnel Ry. Co.*, 129 Fed. 513, 64 C. C. A. 87.

which the purchaser is buying, and the failure to do so furnishes no ground for the rescission of the sale.<sup>493</sup> In a case where a receiver sold a judgment, under order of the court, and the purchaser knew that certain collateral security was really valuable, but said nothing about it, and the receiver had no knowledge on the subject, it was said: "A suppression or concealment of facts forms no ground for rescission, or for the cancellation of a muniment of title, unless it is a violation of some duty, and hence some kind of a fraud. If any duty to communicate this information had been imposed upon the appellant, either at law or in equity, his silence might have been fatal to his purchase. But he occupied no fiduciary relation to the receiver or to the court. They asked him no questions. He owed them no duty to speak. A vendor is presumed to have special knowledge of his own property, and the duty to inform a purchaser of latent defects in it sometimes rests upon him. But the appellant was a vendee. No such duty rests upon a buyer, because he has a right to presume that a vendor knows his own property, its title, its character, and its value, and hence he may safely buy in silence at any price which the vendor is willing to accept. It is not the duty of a purchaser to communicate to his vendor information of which the vendor is ignorant relative to the character or value of the property which he is buying, and a failure to do so furnishes no ground for rescinding a sale, or for canceling an order of court which authorizes it."<sup>494</sup>

<sup>493</sup>*American Car & Foundry Co. v. Merchants' Despatch Transp. Co.* (D. C.) 216 Fed. 904; *Baker v. Lehman*, 186 Ala. 493, 65 South. 321; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403; *Blydenburgh v. Welsh*, Baldw. 331, Fed. Cas. No. 1,583; *Pratt Land & Improvement Co. v. McClain*, 135 Ala. 452, 33 South. 185, 93 Am. St. Rep. 35; *Moses v. Katzenberger*, 84 Ala. 95, 4 South. 237; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Faxon v. Baldwin*, 136 Iowa, 519, 114 N. W. 40; *Culton v. Asher*, 149 Ky. 659, 149 S. W. 946; *Horn v. Beatty*, 85 Miss. 504, 37 South. 833; *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351; *Neill v. Shamburg*, 158 Pa. 263, 27 Atl. 992; *Standard Steel Car Co. v. Stamm*, 207 Pa. 419, 56 Atl. 954; *Guaranty Safe Deposit & Trust Co. v. Liebold*, 207 Pa. 399, 56 Atl. 951; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881, 1 Ann. Cas. 986; *Fox v. Mackreth*, 2 Brown Ch. 319.

<sup>494</sup>*Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403.

On this principle, the fact that one buying land was an agent of a railroad, and knew that it intended to construct a road through that section, which would enhance the value of property, but kept this knowledge to himself until he had obtained title to the land, which he did under an assumed name, was held not to be a fraud on the vendor.<sup>495</sup> So, if the purchaser of real estate has discovered the existence of valuable mineral ores underlying the property, he is not bound to disclose this fact to the seller, although he knows that the seller is ignorant of it, and a court of equity will not set aside the sale, though the price agreed on does not include anything for the mine or mineral deposits, or would be no more than a fair price for the land without the mine.<sup>496</sup> And a person about to purchase an oil lease is not bound to disclose to his vendor facts in regard to the production of oil on a neighboring leasehold which he owns, and the failure to disclose such facts is not fraud.<sup>497</sup> But it should be noted in passing that, under the act of Congress authorizing suits to cancel patents to lands erroneously certified or patented and to restore the title thereof to the United States, a patent conveying mineral lands knowingly purchased as agricultural lands will be canceled.<sup>498</sup>

But it cannot be denied that the operation of this rule often enables an unscrupulous person to gain an iniquitous advantage. As once remarked by an English judge, "the courts will not correct a contract merely because a man of nice honor would not have entered into it." Yet it is painful to a court of equity to enforce an unconscionable bargain. Hence they have been much inclined, in gross and shocking cases, to seize upon any active fraud or falsehood of the purchaser, however slight, which, added to his concealment of the facts within his knowledge, might serve to convert his moral fraud into a legal fraud.<sup>499</sup> And some-

<sup>495</sup> *Boyd v. Leith* (Tex. Civ. App.) 50 S. W. 618.

<sup>496</sup> *Fox v. Mackreth*, 2 Brown Ch. 319, 400; *Bean v. Valle*, 2 Mo. 126; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Neill v. Shamburg*, 158 Pa. 263, 27 Atl. 992.

<sup>497</sup> *Neill v. Shamburg*, 158 Pa. 263, 27 Atl. 992.

<sup>498</sup> *United States v. Central Pac. R. Co.* (C. C.) 84 Fed. 218.

<sup>499</sup> *Hanley v. Sweeny*, 109 Fed. 712, 48 C. C. A. 612; *Diffendarfer v. Dicks*, 105 N. Y. 445, 11 N. E. 825; *Morley v. Harrah*, 167 Mo. 74,



times the rule has been frankly repudiated, as in a recent case in Wisconsin, where it was held that one who purchases an estate in remainder, and obtains it for a small price by concealing from the vendor the fact that the tenant for life is already dead and the estate vested, is guilty of such a fraud as will warrant the rescission of the sale.<sup>500</sup>

**§ 67. Same; Concealment Accompanied by Fraud or Falsehood.**—Although a purchaser of property is not bound to disclose to the seller facts within his knowledge and unknown to the seller which affect the character or value of the property, unless special circumstances impose this duty upon him, yet if, in addition to such concealment, he practises any fraud upon the vendor to induce him to part with the property at an inadequate price, in the way of any trick, artifice, or misrepresentation, the vendor may have relief. The leading case on this proposition was decided by the Supreme Court of the United States, and was an action by the purchaser of a quantity of tobacco against the sellers to recover possession of it. It was in evidence that, before the sale was agreed on, the buyer was asked by one of the sellers whether there was any news which was calculated to enhance the price or value of it. He kept silence, although he had received news of the signing of the treaty of Ghent, which the sellers had not, and which would materially affect the value of the tobacco. The court below directed a verdict for the plaintiff on the theory that he had not done or suggested anything to mislead or impose upon the sellers or induce them to think that there was no such news. But the Supreme Court held that, while it could not be laid down as a matter of law that the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor, yet at the same time, each party must take care not to say or do anything tending to impose upon the other, and that the absolute instruc-

66 S. W. 942; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183. And see cases cited in next section.

<sup>500</sup>*Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.



tion of the judge was erroneous, and the question whether any imposition was practised by the vendee upon the vendors ought to have been submitted to the jury.<sup>501</sup> In another illustrative case, it appeared that the complainant owned a part interest in a mine, but lived at a distance from the scene and took no part in its operation or management, his interests being looked after by his agents who were employed in hauling the ore to the mill. The foreman of the mine discovered a rich vein of ore, which enormously increased the value of the property, but at once boarded it up, concealing it from the complainant's agents, to whom he stated that there was no improvement in the condition of the mine. But he disclosed the fact of the strike to one M., an outside party, and kept him informed of the development of the new vein. M. bought out the complainant for a price based on the former history of the mine, but not at all proportioned to its present value. It was held that the fraud was sufficient to warrant the cancellation of the deed in equity, in the hands of M. or in the hands of his grantee with notice.<sup>502</sup> In another case, the subject of sale was an estate in remainder. The purchaser knew that the life tenant was dying, but concealed this fact from the remainderman, who knew nothing of it. On being asked by the remainderman how the life tenant and her husband were getting on, he replied that he thought they were "getting along a little smoother than they had been." Thereupon he succeeded in purchasing the estate in remainder for about half its value. It was held that his concealment of the material fact, together with his deceptive and misleading answer to the question, furnished ground for the rescission of the contract of sale.<sup>503</sup>

It may therefore be said that fraud is committed by a purchaser who not only conceals his knowledge of facts affecting the value of the property but also employs artifice to prevent the owner from acquiring the same information until after he has been able to buy the property at an inad-

<sup>501</sup> *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. Ed. 214.

<sup>502</sup> *Gruber v. Baker*, 20 Nev. 453, 23 Pac. 858, 9 L. R. A. 302.

<sup>503</sup> *Hays v. Meyers*, 32 Ky. Law Rep. 832, 107 S. W. 287, 17 L. R. A. (N. S.) 284.

equate price,<sup>504</sup> or by a purchaser who tells the vendor of facts and conditions which are calculated to depreciate the value of the property, but at the same time omits to disclose other facts within his knowledge which would much increase its value.<sup>505</sup> And a very common instance of fraud of this kind is seen in the case where the purchaser has discovered a valuable mine, quarry, or mineral deposit on the land, of which the owner is ignorant, and, not content with merely keeping his knowledge to himself, steps over the line and commits an active fraud by assuring the vendor that the land is worth nothing except for the timber on it, or that it is useless except as pasture or grazing land, or, if he admits anything at all in regard to the mineral deposits, misrepresents their value or extent. In these cases, the courts have always been ready to afford relief to the defrauded vendor.<sup>506</sup>

<sup>504</sup> *Bowman v. Bates*, 2 Bibb (Ky.) 47, 4 Am. Dec. 677.

<sup>505</sup> *Manley v. Carl*, 20 Ohio Cir. Ct. R. 161.

<sup>506</sup> *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399; *Caples v. Steel*, 7 Or. 491; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Stackpole v. Hancock*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390. But see *Storthz v. Arnold*, 74 Ark. 68, 84 S. W. 1036.

## CHAPTER III

## FALSE REPRESENTATIONS

- § 68. False Representations as Ground of Rescission in General.
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§ 68. **False Representations as Ground of Rescission in General.**—A “representation,” within the law of fraud, is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create upon the mind of another a distinct impression of fact conducive to action.<sup>1</sup> And a “misrepresentation” or false representation is that which, if accepted, leads the mind to an apprehension of a condition other and different from that which actually exists.<sup>2</sup> Now the element of obligation whereon a contract can be enforced springs primarily from the unrestrained mutual assent of the contracting parties; and where the consent of either is constrained and involuntary, and induced by fraud or force, the contract may be rescinded or adjudged void.<sup>3</sup> If a party is deceived or misled into believing that the material facts are different from what they really are, or is led to place his belief in the existence of alleged conditions or circumstances which are purely supposititious, and is thereby

<sup>1</sup> *St. Louis & S. F. R. Co. v. Reed*, 37 Okl. 350, 132 Pac. 355.

<sup>2</sup> *Haigh v. White Way Laundry Co.*, 164 Iowa, 143, 145 N. W. 473, 50 L. R. A. (N. S.) 1091.

<sup>3</sup> *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597.

induced to enter into a contract, it is evident that his consent has not been freely and intelligently given. Hence the rule that a material false representation, intentionally made for the purpose of deceiving another and inducing him to enter into a contract to which he would not have agreed if he had known the truth, and which accomplishes that result, amounts in law to actual fraud.<sup>4</sup> This brings the case within the general principles of rescission for fraud, and warrants the statement of the general proposition (which is amply supported by the authorities) that a party who has been induced to enter into a contract or any kind of obligation by means of material misrepresentations made fraudulently by the other party, to his resulting prejudice, will be entitled to rescind the contract, upon discovering the fraud, or to be relieved in a court of equity.<sup>5</sup>

<sup>4</sup> *Emlen v. Roper*, 133 Ga. 726, 66 S. E. 934; *Harding v. Lloyd*, 3 Pa. Super. Ct. 293; *Pritchett v. Ahrens*, 26 Ind. App. 56, 59 N. E. 42, 84 Am. St. Rep. 274; *Watson v. Jones*, 41 Fla. 241, 25 South. 678; *Willink v. Vanderveer*, 1 Barb. (N. Y.) 599; *Mather v. Barnes* (C. C.) 146 Fed. 1000.

<sup>5</sup> *In re Underwood & Daniel* (D. C.) 215 Fed. 279; *United States v. Collett*, 159 Fed. 932, 87 O. C. A. 460; *Robinson v. Mutual Reserve Life Ins. Co.* (C. C.) 182 Fed. 850, 858; *Perry v. Boyd*, 126 Ala. 162, 28 South. 711, 85 Am. St. Rep. 17; *McCoy v. Prince*, 11 Ala. App. 388, 66 South. 950; *Righter v. Roller*, 31 Ark. 170; *Reese v. Wyman*, 9 Ga. 430; *Bowen v. Schuler*, 41 Ill. 192; *Clark v. Evans*, 138 Ill. App. 56; *Stockham v. Adams*, 96 Ill. App. 152; *State v. Holloway*, 8 Blackf. (Ind.) 45; *Hall v. Orvis*, 35 Iowa, 366; *Foard v. McComb*, 12 Bush. (Ky.) 723; *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Perley v. Blach*, 23 Pick. (Mass.) 283, 34 Am. Dec. 56; *Metropolitan Life Ins. Co. v. Freedman*, 159 Mich. 114, 123 N. W. 547, 32 L. R. A. (N. S.) 298; *Spangler v. Kite*, 47 Mo. App. 230; *Demorest v. Eastman*, 59 N. H. 65; *Bridge v. Penniman*, 105 N. Y. 642, 12 N. E. 19; *Rich v. Niagara Sav. Bank*, 3 Hun (N. Y.) 481; *Rose v. Merchants' Trust Co.* (Sup.) 96 N. Y. Supp. 946; *Van Denburg v. Scott*, 78 Misc. Rep. 281, 138 N. Y. Supp. 149; *Schechinger v. Gault*, 35 Okl. 416, 130 Pac. 305, Ann. Cas. 1914D, 468; *Thompson v. Chambers*, 13 Pa. Super. Ct. 213; *Broadfoot v. Gibson*, 3 Desaus. (S. C.) 39; *Jesse French Piano & Organ Co. v. Costley* (Tex. Civ. App.) 116 S. W. 135; *Le Vine v. Whitehouse*, 37 Utah, 260, 109 Pac. 2, Ann. Cas. 1912C, 407; *Menz v. Beebe*, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601. And see *Riverside Inv. Co. v. Gibson*, 67 Fla. 130, 64 South. 439; *McDowell v. Volk*, 164 App. Div. 311, 150 N. Y. Supp. 581; *Starnes v. Raleigh, C. & S. Ry.* (N. C.) 87 S. E. 43; *Merrifield v. McClay*, 72 Or. 90, 142 Pac. 587; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490; *Sams v. Barnes*, 74 W. Va. 420, 82 S. E. 124.

The essential elements of a fraudulent misrepresentation, justifying rescission, have been broadly and roughly stated, in a large number of decided cases, somewhat as follows: (1) There must have been a false representation as to a material matter of fact; (2) there must have been scienter or guilty knowledge of its falsity on the part of the person making it; (3) the person to whom it was made must have been ignorant of its falsity; (4) there must have been an intention that it should have been acted upon by him; (5) the latter must have relied on the misrepresentation, and have been deceived by it, and acted upon it; (6) resulting loss, damage, or injury to him must be shown as a consequence of it.<sup>6</sup> But if perfect accuracy in the formulation

<sup>6</sup> *Southern Development Co. v. Silva*, 125 U. S. 250, 8 Sup. Ct. 881, 31 L. Ed. 678; *Cook v. Hale* (D. C.) 210 Fed. 340; *Seeley v. Reed* (C. C.) 25 Fed. 361; *Evatt v. Hudson*, 97 Ark. 265, 133 S. W. 1023; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485; *Ranch v. Lynch*, 4 Boyce (Del.) 446, 80 Atl. 134; *Huffstetler v. Our Home Life Ins. Co.*, 67 Fla. 324, 65 South. 1; *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, 86 N. E. 219; *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916; *Prout v. Hoy Oil Co.*, 263 Ill. 54, 105 N. E. 26; *Beach v. Beach*, 160 Iowa, 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915D, 216; *Grentner v. Fehrenschild*, 64 Kan. 764, 68 Pac. 619; *Chicago Bldg. & Mfg. Co. v. Beaven*, 149 Ky. 267, 148 S. W. 37; *Taylor v. Mullins*, 151 Ky. 597, 152 S. W. 774; *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17; *Adams v. Burton*, 107 Me. 223, 77 Atl. 835; *Patten v. Field*, 108 Me. 299, 81 Atl. 77; *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979; *Noble v. Buddy*, 160 Mo. App. 318, 142 S. W. 436; *Stratton v. Dudding*, 164 Mo. App. 22, 147 S. W. 516; *T. C. Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Moyer v. Richardson Drug Co.*, 70 Neb. 190, 97 N. W. 244; *Canon v. Farmers' Bank*, 3 Neb. (Unof.) 348, 91 N. W. 585; *Omaha Electric Light & Power Co. v. Union Fuel Co.*, 88 Neb. 423, 129 N. W. 989; *Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698; *Wakefield Rattan Co. v. Tappan*, 70 Hun, 405, 24 N. Y. Supp. 430; *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910; *Masterton v. Beers*, 31 N. Y. Super. Ct. 406; *Greene v. Mercantile Trust Co.*, 60 Misc. Rep. 189, 111 N. Y. Supp. 802; *Buchall v. Higgins*, 109 App. Div. 607, 96 N. Y. Supp. 241; *Fox v. Trigger* (Sup.) 126 N. Y. Supp. 78; *White Sewing Mach. Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Robertson v. Halton*, 156 N. C. 215, 72 S. E. 316, 37 L. R. A. (N. S.) 298; *Sipes v. Dickinson*, 39 Okl. 740, 136 Pac. 761; *McFarland v. Carlsbad Hot Springs Sanitarium Co.*, 68 Or. 530, 137 Pac. 209, Ann. Cas. 1915C, 555; *Wheelwright v. Vanderbilt*, 69 Or. 326, 138 Pac. 857; *Wynne v. Allen*, 7 Baxt. (Tenn.) 312, 32 Am. Rep. 562; *Orr v. Goodloe*, 93 Va. 263, 24 S. E. 1014; *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.) 707; *Home Gas Co. v. Mannington Co-op-*

of a general rule is required, it may easily be shown that the foregoing commonly accepted enumeration is not nearly comprehensive enough. The various elements which must be present to bring a misrepresentation within the proper cognizance of a court of equity will be separately discussed in the succeeding sections of this chapter. But at present it may be remarked that, to make the rule absolutely complete, at least the following points should be added to those mentioned above: (7) The representation must relate to a past or present matter of fact, not a matter of law, and must not be merely promissory, and must not be put forward simply as an expression of opinion; (8) it must have been made by the party sought to be charged, or by his agent or some one authorized to make it in his behalf; (9) it must have been made to the complaining party, or made to a third person in order to be communicated to him, or made to the general public and brought to the individual notice of such party; (10) the circumstances must have been such as to justify the defrauded party in relying on the representation, as a basis for his own decision or action, without making an independent investigation of its truth or falsity, or he must have been in some way dissuaded or prevented from making a sufficient investigation.<sup>7</sup>

erative Window Glass Co., 63 W. Va. 266, 61 S. E. 329. And see, further, *Bell v. Morley*, 223 Fed. 628, 139 C. C. A. 174; *Deyo v. Hudson*, 89 Misc. Rep. 525, 153 N. Y. Supp. 693; *Pritchard v. Dailey*, 168 N. C. 330, 84 S. E. 392; *Corby v. Hull*, 72 Or. 429, 143 Pac. 639.

<sup>7</sup> As supporting the general rule stated in the text in its more ample form, see *Upchurch v. Mizell*, 50 Fla. 456, 40 South. 29; *Dickinson v. Atkins*, 100 Ill. App. 401; *Eckman v. Webb*, 116 Ill. App. 467; *State Bank v. Hamilton*, 2 Ind. 457; *Jagers v. Jagers*, 49 Ind. 428; *Boulden v. Stilwell*, 100 Md. 453, 60 Atl. 609, 1 L. R. A. (N. S.) 258; *Parker v. Armstrong*, 55 Mich. 176, 20 N. W. 892; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Edwards v. Noel*, 88 Mo. App. 434; *McClure v. Campbell*, 148 Mo. 96, 49 S. W. 881; *Connelly v. Brown*, 73 N. H. 193, 60 Atl. 750; *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064; *Brown v. Eccles*, 2 Pa. Super. Ct. 192; *Lowe v. Trundle*, 78 Va. 65; *Dudley v. Minor's Ex'r*, 100 Va. 728, 42 S. E. 870; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593. As to the requirement that the representation shall not relate to a matter of law see, *infra*, § 71; that it shall not be promissory, *infra*, § 89; that it shall amount to an assertion rather than an opinion, *infra*, § 76; as to representations by agents or third persons, see, *infra*, § 93;



Perhaps a clearer understanding of the essentials of the rule may be obtained from a negative statement of it, such as was made in a case in West Virginia, as follows: If a misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it, or if it was vague or inconclusive in its own nature, or if it was a matter of opinion, or a fact equally open to the inquiries of both parties, and there was no reason why either should be presumed to trust to the other, then there is no ground to interfere to grant relief on the ground of fraud.<sup>8</sup>

§ 69. **Nature of Misrepresentations Justifying Rescission.**—In the law of contracts, a representation is a statement made by one of the parties to the other, before or at the time of making the contract, in regard to some fact, circumstance, or state of facts pertinent to the contract, which is influential in bringing about the agreement, but which is not itself a part of the contract. In the law of fraud, a representation is anything short of a warranty, which proceeds from the action or conduct of the party charged, and which is sufficient to create in the mind a distinct impression of fact conducive to action.<sup>9</sup> To be available as a defense against the contract, it must have related to and entered into the very making of the contract. A gratuitous or supererogatory statement or act, however misleading, which is unnecessary to the negotiations and is not an inducement to the agreement, is not of this character.<sup>10</sup> Again, to be available in law, the representation must have been definite and specific, and such as may be supposed to have created a distinct impression in the mind of the party receiving it, and not vague, loose, or general,<sup>11</sup>

as to the making or communication of it to the complaining party, *infra*, §§ 95, 96; and as to the duty of investigation, or the right to rely on the representation made, see *infra*, § 113.

<sup>8</sup> *Crislip v. Cain*, 19 W. Va. 438.

<sup>9</sup> *St. Louis & S. F. R. Co. v. Reed*, 37 Okl. 350, 132 Pac. 355.

<sup>10</sup> *Allinder v. Bessemer Coal, Iron & Land Co.*, 164 Ala. 275, 51 South. 234.

<sup>11</sup> *Sinclair v. Higgins*, 46 Misc. Rep. 136, 93 N. Y. Supp. 195; *Id.*, 111 App. Div. 206, 97 N. Y. Supp. 415; *Boulden v. Stilwell*, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258.



although a party may be guilty of false representations if he knowingly takes advantage of a false impression created by what he has said.<sup>12</sup> And the representation must be in the nature of an assertion of a fact, not merely descriptive. Thus, where one takes a written lease of a designated piece of land "upon which there is an iron bank," he is liable for the rent so long as he occupies the land under the lease, irrespective of the amount or character of the ore in the bank, for the words quoted are matter of description only, and are not a warranty nor a representation that there is a bank of merchantable iron ore on the land.<sup>13</sup> But it is said that where the subject of sale is timber trees, a general description of the trees may support an action for breach of the contract, though it would not support an action for deceit.<sup>14</sup>

Again, the misrepresentation must relate to some past or existing matter of fact. A statement merely in regard to the party's future purposes or intentions will not ordinarily be sufficient.<sup>15</sup> But it is not necessary that the matter of fact referred to should have to do with anything visible or tangible. It must be matter of fact, as distinguished from matter of opinion, and it must relate to some past or present fact, as distinguished from that which may arise in the future. But if these conditions are satisfied, it may exist only in the mind of the party, or depend upon the exercise of some mental faculty of his, or be verifiable only in its results. To illustrate this principle, in a case in Wisconsin it appeared that certain real estate agents had been employed to procure a purchaser for certain land, and had expended considerable effort in obtaining a possible purchaser. The owner of the property represented to them that he had withdrawn the land from sale, and thereupon the agents were induced to accept a small sum in discharge of their claim for services. In fact, the owner had not withdrawn

<sup>12</sup> *Roberts v. Tompkins*, 75 N. J. Eq. 576, 73 Atl. 505.

<sup>13</sup> *Clark v. Midland Blast Furnace Co.*, 21 Mo. App. 58.

<sup>14</sup> *Stark Bros. Nurseries & Orchards Co. v. Mayhew*, 160 Mo. App. 60, 141 S. W. 433.

<sup>15</sup> *Lowry Nat. Bank v. Hazard*, 223 Pa. 520, 72 Atl. 889. As to promissory representations in general, see, *infra*, § 89.

the property at all, but he sold it shortly afterwards to the same purchaser whom the agents had procured. It was held that this constituted a false representation of an existing and material fact, such as to avoid the settlement made, though relating to an "existing mental determination."<sup>16</sup> So, if a director of a railroad company induces parties to deliver to him an order for stock in another corporation, by representing that he has power or influence to control the action of his company in establishing or promoting new lines or branches, when in fact he has no such power or influence, the contract is fraudulent and cannot be enforced.<sup>17</sup> And generally, the pretense of power, whether moral, physical, or supernatural, made with intent to obtain money or gain an advantage over the other party, is a form of fraud.<sup>18</sup>

Again, a misrepresentation may be as well by deeds and acts as by words, and by artifices to mislead as well as by positive assertions.<sup>19</sup> Thus, where the subject of a sale was a machine for making cloth, and the purchaser defended an action for the price on the ground that the machine would not make salable cloth, as represented by the plaintiff, it was held that this defense could not be met by the contention that the plaintiff had made no representations, since his offer to sell was equivalent thereto.<sup>20</sup> And generally, if a vendor knows the purposes for which an article is intended by the purchaser, and knowingly and fraudulently represents that he knows the purchaser's business and that the article is well fitted for it, and the purchaser relies on such representation in making the purchase, and it is untrue, it is a fraudulent misrepresentation.<sup>21</sup> And again, "if a manufacturer has adopted a particular mark to

<sup>16</sup> *Bowe v. Gage*, 127 Wis. 245, 106 N. W. 1074, 115 Am. St. Rep. 1010.

<sup>17</sup> *Sargent v. Kansas Midland R. Co.*, 48 Kan. 672, 29 Pac. 1063.

<sup>18</sup> *Regina v. Giles, Leigh & Cave C. C.* (English) 502. And see *Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871.

<sup>19</sup> *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811; *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390; *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 969.

<sup>20</sup> *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28.

<sup>21</sup> *Hanger v. Evins*, 38 Ark. 334.

denote that the goods so marked were made by him, and the mark has become known and is understood in the trade, he who uses the mark for the purpose of deceiving purchasers and making them believe the goods to be the goods of the manufacturer who has introduced the mark, is guilty of a false and fraudulent representation, and if this produces damage to another, the person injured is entitled to an action for the deceit."<sup>22</sup>

In the next place, it is not necessary that all of the statements made by the one party to the other should have been false. Though every other representation or assurance given by him should be true, yet a single material misstatement knowingly made, with intent to influence the other party into entering into the contract, will be sufficient ground for its rescission, if believed in and relied on.<sup>23</sup> And again, if a number of representations are made and are all false, though some were of such a character or so made that the party was not justified in relying on them or did not in fact rely on them, yet if there was one on which he was warranted in relying and did rely, it is enough to avoid the contract.<sup>24</sup>

If one is induced by false representations to sign a paper which is different from what he supposes he is signing, or is the victim of a substitution, it is a fraud against which relief may be given.<sup>25</sup> If an infant conveys premises under the fraudulent representation that he is over twenty-one, which representation in connection with his appearance is believed, he cannot repudiate his bargain and have the deed canceled, at least without restoring the consideration received.<sup>26</sup> So, if one falsely represents that he is unmarried,

<sup>22</sup> 2 *Add. Torts* (Wood's edn.) § 1199.

<sup>23</sup> *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32; *Wickham v. Roberts*, 112 App. Div. 742, 98 N. Y. Supp. 1092.

<sup>24</sup> *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

<sup>25</sup> *Fowler Cycle Works v. Fraser*, 110 Ill. App. 126. And see, *supra*, §§ 28, 56.

<sup>26</sup> *International Land Co. v. Marshall*, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056. As to misrepresentations concerning age or capacity to contract, inducing an adult to enter into a contract with an infant, and estoppel of the infant to repudiate the contract, see, *infra*, § 302.

and thereby induces a woman to enter into an engagement of marriage with him, and taking advantage of the confidence thus engendered induces her to part with her property for his benefit, the original misrepresentation may be set up to avoid the transaction.<sup>27</sup> And false representations as to the character or validity of a vendor's title to land will be cause for rescinding the sale.<sup>28</sup> A very numerous class of illustrations of these principles are to be found in the case where an unscrupulous person, dealing with two or more others, "plays off" one against the other, or uses a trick upon one to deceive the other. For instance, where a person obtains a contract for the conveyance of land from two joint owners, by negotiating with them separately and falsely stating to the one that the other has agreed to his terms, he is guilty of such fraud as will prevent him from enforcing specific performance of his contract.<sup>29</sup> So, where two persons are induced to join in the purchase of property, and each gives his check for his share, but one of them is in collusion with the vendor and is used as a mere decoy, and his check is returned to him, the other may rescind the purchase.<sup>30</sup> And for the same reason, fictitious subscriptions to the capital stock of a corporation, or to any other common object, obtained merely for the purpose of inducing other persons to subscribe in good faith, are fraudulent and render voidable all subscriptions afterwards taken in reliance on their genuineness.<sup>31</sup> And if a person secures signatures to a note under the promise that it shall not be regarded as delivered until others, specified by name, shall have signed, and then secures the unconditional signatures of a part only of those others, keeping silence as to the conditional character of the former signatures, the latter are to be regarded as obtained by fraud.<sup>32</sup>

<sup>27</sup> *Harris v. Dumont*, 207 Ill. 583, 69 N. E. 811.

<sup>28</sup> See, *infra*, § 420.

<sup>29</sup> *Perkins v. Lyons*, 68 Wash. 498, 123 Pac. 793.

<sup>30</sup> *Seaver v. Snyder*, 21 Colo. App. 431, 122 Pac. 402.

<sup>31</sup> *Middlebury College v. Loomis' Adm'rs*, 1 Vt. 189; *Cropper v. Gordon*, 13 Ky. Law Rep. 140; *Highland University Co. v. Long*, 7 Kan. App. 173, 53 Pac. 766; *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51.

<sup>32</sup> *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192.

§ 70. **Materiality of Representations.**—In order to rescind a contract or cancel an obligation on the ground of fraudulent misrepresentations, it is requisite not only that their falsity should be shown but also the fact that they were material to the transaction, that is to say, not trifling or unimportant, but relating to a substantial matter, and of such a character that the party defrauded would not have entered into the contract or given the obligation, or would not have accepted the terms agreed on, if he had known the truth of the matter.<sup>33</sup> “If the fraud be such that, had it not been practised, the contract could not have been made or the transaction completed, then it is material to it; but if it be made probable that the same thing would have been done if the fraud had not been practised, it cannot be deemed material.”<sup>34</sup> Thus, for instance, rescission of a

<sup>33</sup> *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22; *Crooker v. White*, 162 Ala. 476, 50 South. 227; *Larimer County Land Imp. Co. v. Cowan*, 5 Colo. 320; *Thomas v. Grise*, 1 Pennewill (Del.) 381, 41 Atl. 883; *Allen v. United Zinc Co.*, 64 Fla. 171, 60 South. 182; *Van Gundy v. Steele*, 261 Ill. 206, 103 N. E. 754; *Fuchs & Lang Mfg. Co. v. R. J. Kittridge & Co.*, 242 Ill. 88, 89 N. E. 723; *Young v. Young*, 113 Ill. 430; *Press v. Hair*, 133 Ill. App. 528; *Hock v. Jorgeson*, 137 Ill. App. 199; *Rauh v. Waterman*, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42; *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893; *Long v. Duncan*, 14 Ky. Law Rep. 812; *Hotchkiss v. Bon Air Coal & Iron Co.*, 108 Me. 34, 78 Atl. 1108; *Garry v. Garry*, 187 Mass. 62, 72 N. E. 335; *Powell v. Adams*, 98 Mo. 598, 12 S. W. 295; *Birch Tree State Bank v. Dowler*, 167 Mo. App. 373, 151 S. W. 784; *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 89, 133 S. W. 357; *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117; *Clark v. Tennant*, 5 Neb. 549; *Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698; *Shale v. Butler* (Sup.) 136 N. Y. Supp. 252; *Turchin Sheffield Plate & Sterling Silver Co. v. Baugh* (Sup.) 117 N. Y. Supp. 137; *White Sewing Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Gilmer v. Hanks*, 84 N. C. 317; *Bromonia Co. v. Greenwood Drug Co.*, 78 S. C. 482, 59 S. E. 363; *Thompson v. Hardy*, 19 S. D. 91, 102 N. W. 299; *Leiker v. Henson* (Tenn. Ch. App.) 41 S. W. 862; *Furneaux v. Webb*, 33 Tex. Civ. App. 560, 77 S. W. 828; *Karner v. Ross*, 43 Tex. Civ. App. 542, 95 S. W. 46. And see *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Hall v. Brown*, 126 Md. 169, 94 Atl. 530; *Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871; *McKinley v. Warren*, 218 Mass. 310, 105 N. E. 990; *Haywood v. Lockwood*, 90 Misc. Rep. 31, 152 N. Y. Supp. 483.

<sup>34</sup> *McAleer v. Horsey*, 35 Md. 439. And see *Damers v. Sternberger* (Sup.) 95 N. Y. Supp. 532. A misrepresentation so trivial that it could not have influenced the conduct of the party complaining is not actionable fraud. *Lucas v. Long* (Md.) 94 Atl. 12.

contract for the sale of land will not be granted on the ground of fraudulent representations of the vendor to the vendee as to the title to the premises, unless that portion of the land to which he cannot make title constitutes the principal inducement to the purchase, and without which the land purchased would be unfit for the purpose intended.<sup>35</sup>

Representations concerning the value of the subject-matter are generally material. Thus, if the seller makes a false representation as to the cost of the article sold, or as to what he paid for it, it is material.<sup>36</sup> So, on the sale of a patent or of rights under it, the cost of manufacturing the article covered by the patent is a material consideration in estimating the value,<sup>37</sup> and so is the seller's statement as to the amount of sales of the patented article which he has already made.<sup>38</sup> So, on a sale of land, a statement as to the quantity or value of the crops raised on it during a particular season is a material representation,<sup>39</sup> and so is a statement as to the amount of timber standing on the land,<sup>40</sup> or a representation that certain peach trees on the land are of a certain fine variety, whereas the fruit they produce is really unmarketable.<sup>41</sup> So also, misrepresentations by a vendor of motor trucks that they are the best made and that they are beyond the experimental stage, are material,<sup>42</sup> and this is likewise true of a false statement that a piano sold to the plaintiff had a mandolin attachment,<sup>43</sup> that a book, the canvassing rights for which constituted the subject of the sale, was copyrighted,<sup>44</sup> and that a city lot was above the grade established for the street.<sup>45</sup> It is also

<sup>35</sup> *Coffee v. Newsom*, 2 Ga. 442.

<sup>36</sup> *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467; *Wegner v. Herkimer*, 167 Mich. 587, 133 N. W. 623.

<sup>37</sup> *Braley v. Powers*, 92 Me. 203, 42 Atl. 362.

<sup>38</sup> *King v. White*, 119 Ala. 429, 24 South. 710.

<sup>39</sup> *Adams v. Burton*, 107 Me. 223, 77 Atl. 835.

<sup>40</sup> *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76.

<sup>41</sup> *Pamplin v. Rowe*, 100 Ark. 144, 139 S. W. 1106.

<sup>42</sup> *Hall v. Duplex-Power Car Co.*, 168 Mich. 634, 135 N. W. 118. Representations as to age and length of service of secondhand automobile, see *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952.

<sup>43</sup> *Ross-Armstrong Co. v. Shaw* (Tex. Civ. App.) 113 S. W. 558.

<sup>44</sup> *Coffey v. Hendrick*, 23 Ky. Law Rep. 1328, 65 S. W. 127.

<sup>45</sup> *Dinwiddie v. Stone*, 21 Ky. Law Rep. 584, 52 S. W. 814.

generally true that representations concerning solvency, credit, financial condition, or the value of securities are to be considered as material, such, for instance, as a representation that the maker of a note is solvent,<sup>46</sup> that the party making the representations is worth a certain amount of money,<sup>47</sup> that the assets of a corporation are unincumbered and its business prosperous,<sup>48</sup> that the seller of a stock of goods has no creditors,<sup>49</sup> and a published statement of the financial condition of a national bank, in which a portion of its overdrafts is described as "loans and discounts," is materially false.<sup>50</sup> For the same reason, a false statement that a note given for the purchase price of land is secured by a mortgage in a distant county is material,<sup>51</sup> and so of a false assertion that a mortgage given in exchange for land is a first lien,<sup>52</sup> and that all the shares in a certain venture have been subscribed for.<sup>53</sup> And fraudulent representations by the officers of a building association as to the amount of annual accumulations on the stock, made to induce plaintiff to become a member, and causing him to continue his monthly payments, are representations of material existing facts, sufficient to support an action for deceit.<sup>54</sup> In a case in the federal courts, the complaint charged that the defendant, who was the president of a corporation, in order to induce the plaintiff to accept certain bonds as part consideration for the purchase of property, represented that others had agreed to accept some of the bonds in part payment of property sold to the corporation, that the bonds offered to plaintiff would come in before those held by defendant and his associates, and that as to such bonds plaintiff would occupy a preferred place among the bondholders. These representations being false, it was held that they were ma-

<sup>46</sup> *Benton v. Kuykendall* (Tex. Civ. App.) 160 S. W. 438.

<sup>47</sup> *Taylor v. Scoville*, 3 Hun (N. Y.) 301.

<sup>48</sup> *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188.

<sup>49</sup> *Field Grocery Co. v. Conley*, 31 Ky. Law Rep. 989, 104 S. W. 372.

<sup>50</sup> *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596.

<sup>51</sup> *Himes v. Langley*, 85 Ind. 77.

<sup>52</sup> *Rollins v. Quimby*, 200 Mass. 162, 86 N. E. 350.

<sup>53</sup> *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893.

<sup>54</sup> *Hunter v. Interstate Building & Loan Ass'n*, 24 Tex. Civ. App. 453, 59 S. W. 596.



terial, and sufficient to support the action.<sup>55</sup> Again, a false representation made to induce one to buy goods, to the effect that no similar goods had been sold to any others in the same town, is material,<sup>56</sup> or, on the other hand, a representation that the vendor has sold similar articles to a competing merchant in the same town,<sup>57</sup> or that only a limited number of names would be included in a biographical dictionary, and that only three other residents of plaintiff's town would be invited to subscribe for it and have their biographies and portraits published in it.<sup>58</sup> So again, it has been held that misrepresentations inducing a subscription for a proposed college, that it is to be non-sectarian and named after a certain person, are material and sufficient to avoid the contract.<sup>59</sup> And a similar ruling was made in a case where defendant was induced to buy certain portraits by the statement of the plaintiff's agent that he had shown them to defendant's wife and daughters, and that they authorized the agent to tell defendant to buy them, which was untrue.<sup>60</sup> In a case in Wisconsin, a person who intended to send his daughter to a college, stated to the agent of such an institution that he desired to send his daughter to a school which would be attended by some of her former classmates. The agent then stated that he had obtained contracts from the parents of several of such classmates, naming three of them specifically. This was not true, and it was held that the representation to that effect was fraudulent and material, and justified the rescission of the contract made in reliance upon it.<sup>61</sup>

But on the other hand, where the purchaser of goods is

<sup>55</sup> *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178.

<sup>56</sup> *French & American Importing Co. v. Belleville Drug Co.*, 75 Ark. 95, 86 S. W. 836; *Pratt v. Darling*, 125 Wis. 93, 103 N. W. 229. Representation to a salesman that the book which he is to sell is the only extant publication of that nature, when there are other similar publications, is a misrepresentation of a material fact. *Horne v. John A. Hertel Co.*, 184 Mo. App. 725, 171 S. W. 598.

<sup>57</sup> *Roebuck v. Wick*, 98 Minn. 130, 107 N. W. 1054.

<sup>58</sup> *Greenleaf v. Gerald*, 94 Me. 91, 46 Atl. 799, 50 L. R. A. 542, 80 Am. St. Rep. 377.

<sup>59</sup> *Collinson v. Jeffries*, 21 Tex. Civ. App. 653, 54 S. W. 28.

<sup>60</sup> *Washington Post Co. v. Sorrells*, 7 Ga. App. 774, 68 S. E. 337.

<sup>61</sup> *Brown v. Search*, 131 Wis. 109, 111 N. W. 210.



not deceived as to the maker of them or their quality, a representation as to the place where they were manufactured cannot usually be considered material.<sup>62</sup> And that the vendor of land represents himself to be the owner, when he merely holds an option on it or holds it in the character of a trustee, is not so material a misstatement as to lay a foundation for an action for deceit, if he is able to make title or otherwise fulfill his engagement in regard to it.<sup>63</sup> So, a contract for the sale of real estate which provides that the premises shall be taken subject to monthly tenancies and leases of the various apartments, and that the rents shall be apportioned, renders the terms of the leases immaterial, and the fact that the vendor fraudulently represented that the premises were leased as apartments to divers tenants on leases, and that no free rents were given, is immaterial.<sup>64</sup> And a statement that a party having land for sale would not take less than a particular sum for it is not the statement of a material fact so as to support an action for deceit.<sup>65</sup> And telling a wife that her husband would not object to her purchase of certain books is not a fraud for which the sale can be avoided.<sup>66</sup> So, where the buyer of stone falsely stated that it was not to be used on a particular job, for which the seller had unsuccessfully bid, it was held that this was not such fraud as entitled the seller to refuse performance.<sup>67</sup> In a case before the Supreme Court of the United States, where the vendor of a tax title to land was alleged to have represented that he was president of a bank and of a railway company, and a member of a particular church, and had built a church edifice, and that he had been a member of the state senate and governor of the state, it was held that, even if these represen-

<sup>62</sup> *Brennard Mfg. Co. v. Citronelle Mercantile Co.*, 148 Ala. 666, 41 South. 671.

<sup>63</sup> *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423; *In re Assignment of Brumbaugh*, 43 Wkly. Notes Cas. (Pa.) 271.

<sup>64</sup> *Kreshover v. Berger*, 62 Misc. Rep. 613, 116 N. Y. Supp. 20.

<sup>65</sup> *Baker v. Wheeler*, 149 Ill. App. 579.

<sup>66</sup> *Funk & Wagnalls Co. v. Roehmer* (Sup.) 137 N. Y. Supp. 863.

<sup>67</sup> *Stewart v. Monad Engineering Co.*, 3 Boyce (Del.) 165, 84 Atl. 209. A misrepresentation as to the identity of the other party to the contract is material and ground for rescission. *Wagner v. Magee*, 130 Minn. 162, 153 N. W. 813.

tations had all been false (which was not shown) they would furnish no legal ground for rescinding the contract of sale.<sup>68</sup>

§ 71. **Representations as to Matters of Law.**—Fraud is not to be predicated upon a representation of matter of law. One cannot rescind a contract or withdraw from an obligation into which he was induced to enter by representations made to him by the other party, however false and fraudulent, when such representations related to a matter of law, as distinguished from a matter of fact.<sup>69</sup> The authorities support this rule partly upon the maxim that “ignorance of the law is no excuse,” and partly upon the consideration that one is not justified in relying upon representations made to him by another, when the truth of the matter is not within the exclusive or peculiar knowledge of either, and no fiduciary relation exists, but the sources of information are equally open to both. Thus it is said: “A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention.

<sup>68</sup> *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931.

<sup>69</sup> *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Seeley v. Reed* (C. C.) 25 Fed. 361; *McDonald v. Smith*, 95 Ark. 523, 130 S. W. 515; *Rheingans v. Smith*, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140; *Grone v. Economic Life Ins. Co.* (Del. Ch.) 80 Atl. 809; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88; *Fish v. Cleland*, 33 Ill. 238; *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137; *Reed v. Sidener*, 32 Ind. 373; *Stevens v. Odlin*, 109 Me. 417, 84 Atl. 899; *Avery v. Avery*, 109 Me. 571, 85 Atl. 54; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556; *Connaughton v. Bernard*, 84 Md. 577, 36 Atl. 265; *Bilafsky v. Conveyancers' Title Ins. Co.*, 192 Mass. 504, 78 N. E. 534; *Unckles v. Hentz*, 18 Misc. Rep. 644, 43 N. Y. Supp. 749; *Parker v. Raleigh Sav. Bank*, 152 N. C. 253, 67 S. E. 492; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Bailey v. Frazier*, 62 Or. 142, 124 Pac. 643; *Gormely v. Gymnastic Ass'n*, 55 Wis. 350, 13 N. W. 242. And see *Sharp v. Betts*, 165 Iowa, 373, 145 N. W. 938; *Kinchen v. Austin* (Tex. Civ. App.) 179 S. W. 924.

It is an opinion in regard to the law, and is always understood as such.”<sup>70</sup> And a statement by one of the parties concerning the other’s legal rights or remedies, however strongly asserted, is not a representation of fact. “That a misrepresentation or misunderstanding of the law will not vitiate a contract, when there is no misunderstanding of the facts, is well settled. Misrepresentations touching a party’s legal rights will generally afford no sufficient ground on which to avoid a contract. Such representations, however erroneous and strongly asserted, are to be treated, when made to a party free to inform himself of his legal rights, as mere statements of opinion. The exceptions to the operation of this rule are cases in which some fiduciary relation is found to exist, or such circumstances as show a confidential relation which gives the injured party good right to rely upon such representations, and he does so to his injury.”<sup>71</sup>

Attention should be paid to these exceptional cases in which the general rule does not operate. In the first place, if one of the parties occupies a fiduciary or confidential relation to the other, that other is justified in relying fully, and without inquiry, upon the representations made to him, whether they relate to matter of fact or matter of law, and the corresponding duty to make a full and frank disclosure embraces the law applicable to the case as well as the facts. Hence if, in such a case, advantage is taken of one’s ignorance of the law, or his trust is abused by instilling into his mind an erroneous conception of the law, it is as much a fraud as to deceive him in regard to the facts.<sup>72</sup> And this

<sup>70</sup> *Fish v. Cleland*, 33 Ill. 238, 243. A representation that a certain college has authority to grant a certain degree, made to induce a student to enter the college and take a course of instruction, is a statement of fact, though it involves a question of law. *Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871. Where one was induced to enter into a contract which was actually fraudulent and illegal, upon the faith of representations made to him that it had been held by the courts to be a legal contract which might be sent through the United States mails, he was held entitled to rescind the contract on discovering the falsity of this representation, as it was an assertion of fact and not of law. *Coons v. Lain* (Tex. Civ. App.) 168 S. W. 981.

<sup>71</sup> *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

<sup>72</sup> *Stephens v. Collison*, 249 Ill. 225, 94 N. E. 664; *May v. May*, 29

rule is specially and peculiarly applicable where the party making the representations is the other's own attorney.<sup>73</sup> And again, aside from such a relationship, if one of the parties is ignorant of the law or of his legal position and rights, and the other is aware of this fact, and is also perfectly informed of the legal principles, rules, or statutes applicable to the existing state of affairs, and takes advantage of his superior knowledge and of the other's ignorance, and so misrepresents and misstates the law as to induce him to enter into an inequitable bargain, or to part with rights or property which he might have retained, it is considered such fraud as to justify a court of equity in giving relief.<sup>74</sup>

Aside from such exceptional cases, it is generally considered that it is not an actionable fraud to mislead a person as to the nature or strength of his title to property, or to assert that an adverse claimant has a better title, as these are matters of law and as one is presumed to be informed on such points.<sup>75</sup> Particularly in regard to tax titles, the rule appears to be that, if land has actually been sold for taxes, it is not fraudulent to represent to the owner that his title has been divested by the sale, unless, perhaps, where such representation is accompanied by other statements, which are false, and which relate to matters of fact, as, for instance, in regard to the time of the sale, the issuance of a tax deed, the running of the statute of limitations, or similar matters.<sup>76</sup> Likewise it is held that a statement in regard to the legal effect of a contract, deed, lease, or other

Ky. Law Rep. 1033, 96 S. W. 840; *Spurrer v. McClintock*, 104 Iowa, 79, 73 N. W. 599. For the general rules as to cases of frauds committed by persons in positions of trust or confidence, and as to the various relations which are considered as fiduciary or confidential, see, *supra*, §§ 40-51.

<sup>73</sup> *Altgelt v. Gerble* (Tex. Civ. App.) 149 S. W. 233.

<sup>74</sup> *Buslere v. Reilly*, 189 Mass. 518, 75 N. E. 958; *Ward v. Baker* (Tex. Civ. App.) 135 S. W. 620; *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808; *Lehman v. Shackelford*, 50 Ala. 437; *Headley v. Pickering*, 23 Ky. Law Rep. 905, 64 S. W. 527. See *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252.

<sup>75</sup> *Driver v. White* (Tenn. Ch. App.) 51 S. W. 994.

<sup>76</sup> *De St. Laurent v. Slater*, 19 Misc. Rep. 197, 43 N. Y. Supp. 63. And see *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201; *Squires v. Higginson*, 50 Wash. 364, 97 Pac. 240.

instrument, or the legal rights and legal duties of the parties under it, is not a fraudulent misrepresentation justifying relief in equity, however false, since it relates to matter of law and not to matter of fact.<sup>77</sup> But the purport or legal effect of an instrument is a different thing from its contents. What legal rights it creates is a question of law, but what terms or conditions it contains is a matter of fact. Hence a false representation that a deed does not convey or affect a certain piece of property is not an opinion or a statement of law, but an assertion in regard to a fact, and therefore may lay the foundation for a cancellation of the deed.<sup>78</sup> For similar reasons it is held that a representation to the effect that an obligation is unpaid and in full force and effect, though in reality it is barred by the statute of limitations, is a representation of fact, rather than of law, and may give ground for relief.<sup>79</sup> But to tell a person that he has no cause of action (in respect to a particular case) or that the law is such that he could not recover in a suit which he threatens or intends to bring, and thereby to induce him to accept a compromise or settlement, is not such fraud as will avoid a receipt or release given by him.<sup>80</sup> Thus, where an agent of an insurance company makes representations to one having a claim for a loss against the company (the parties standing in antagonistic relations to each other, and not in any confidential or even friendly relation) to the effect that the claim is not such as could be enforced by any legal proceedings, on account of certain alleged violations of the conditions of the policy, such representations are only statements of opinion, and moreover, opinion upon a question of law, and the claimant has no right to rely upon them, and if he does rely upon them it

<sup>77</sup> *Tradesman Co. v. Superior Mfg. Co.*, 147 Mich. 702, 111 N. W. 343, 112 N. W. 708; *Gipe v. Pittsburgh, C. C. & St. L. Ry. Co.*, 41 Ind. App. 156, 82 N. E. 471; *Du Moulin v. Board of Education of City of New York* (Sup.) 124 N. Y. Supp. 901. See *Buslere v. Relly*, 189 Mass. 518, 75 N. E. 958.

<sup>78</sup> *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85. And see, *supra*, § 56.

<sup>79</sup> *Brown v. Rice*, 26 Grat. (Va.) 467.

<sup>80</sup> *Valley v. Boston & M. R. Co.*, 103 Me. 106, 68 Atl. 635; *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa, 1, 77 N. W. 476.

is at his own risk.<sup>81</sup> So also, representations as to the scope and effect of a copyright, or as to the advantages or immunities which it confers upon the owner, are expressions of opinion, and, if wrong, constitute a mistake of law which will not justify the rescission of a contract.<sup>82</sup> And so, in an action on a contract for the production of a play, fraud on the part of the plaintiff is not shown by proving that he asserted (in good faith) that he had the exclusive right to produce such play in England, when in fact the play was public property, such statement being merely an expression of opinion on a difficult question of law.<sup>83</sup> Again, a subscriber to, or purchaser of, corporate stock has no right to rely on representations as to matters of law, made to induce his subscription or purchase, and cannot rescind it because he was misled or deceived as to his liability in the capacity of a stockholder or the assessability of his stock, or as to the proportion of the face value that would be called for, or as to the time when payment would be demanded.<sup>84</sup> And a representation that a corporation has legal power to issue certain securities, made to an intending lender, but which proves to be incorrect, will not entitle the lender to relief on the ground of fraud.<sup>85</sup>

The validity of a lien is generally a question of law, which a person dealing with the property affected must determine for himself, without relying on representations made to him.<sup>86</sup> But whether any lien exists, whether the necessary steps have been taken to perfect it, or whether it is a first or prior lien or is subordinate to others, are generally questions of fact, in the sense that they depend upon the existence of ascertainable facts rather than upon the application of legal principles to given facts, and false in-

<sup>81</sup> *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

<sup>82</sup> *Burk v. Johnson*, 146 Fed. 209, 76 C. C. A. 567.

<sup>83</sup> *Brady v. Edwards*, 35 Misc. Rep. 435, 71 N. Y. Supp. 972.

<sup>84</sup> *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Rogan v. Illinois Trust & Sav. Bank*, 93 Ill. App. 39. Compare *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544. See *Vick v. Park* (Tex. Civ. App.) 173 S. W. 989.

<sup>85</sup> *Rashdall v. Ford*, L. R. 2 Eq. Cas. 750.

<sup>86</sup> *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

formation on these points, fraudulently given, may afford ground for relief.<sup>87</sup> And so, false and fraudulent statements which incidentally refer to the sale of real estate, and to the rights of a person under a bid therefor at sheriff's sale, by means of which money is procured from another, are actionable to the extent of the injuries sustained.<sup>88</sup> And in an action on a note given to a bank, it is a good defense that the bank represented to defendant that it had acquired some of its own stock, which it could not legally hold, and which must be formally issued, and desired defendant to take the stock temporarily and give his note, until the stock could be sold to an actual purchaser, which he did as an accommodation to the bank.<sup>89</sup> So, a charge of fraud against executors is not sustained by showing that they had represented that a certain decree "is now in full force and effect and no appeal has been taken therefrom," when in fact, previous to the making of such representation, a writ of error had been sued out to review such decree, such writ not having been made a supersedeas.<sup>90</sup>

§ 72. **Same; Law of Another State.**—When the legal rights and duties of a party, or the legal effect of any contract or transaction into which he enters, are dependent upon the laws of a foreign state or country, he is not presumed to have any information thereon, nor required to exercise diligence to inform himself. And if representations as to the existence, terms, or effect of such laws are made to him by the other party, assuming to know them and to advise him concerning them, whereby he is induced to part with his rights or to enter into the contract, they are considered as representations of fact, and not of law, and will justify the rescission of the contract or cancellation of the obligation, if false and made with a fraudulent intention.<sup>91</sup> This rule applies not merely to questions of

<sup>87</sup> *Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 78 S. W. 557; *Kehl v. Abram*, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158; *Hill v. Coates*, 127 Ill. App. 196; *Gillette v. Anderson*, 85 Wash. 81, 147 Pac. 634.

<sup>88</sup> *Newell v. Long-Bell Lumber Co.*, 14 Okl. 185, 78 Pac. 104.

<sup>89</sup> *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540.

<sup>90</sup> *Fraser v. Fraser*, 149 Ill. App. 186.

<sup>91</sup> *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Bethell v.*



law affecting the title to land in another state,<sup>92</sup> but to such matters as, for instance, the statute of limitations of a foreign state.<sup>93</sup> And where one is induced to subscribe for stock in a corporation of another state, representations made to him as to the law of that other state, in respect to the responsibility of stockholders and the like, are statements of fact, and, if false, will release him from his subscription.<sup>94</sup>

**§ 73. Representations Not Contemporary with Making of Contract.**—When the making of a contract has been definitely completed, so that rights and duties under it have become vested, representations concerning the subject-matter afterwards made by one of the parties to the other furnish no ground for relief against the contract, however false and fraudulent, as, for instance, when they are made to disarm his suspicions or prevent an investigation, to make him feel pleased with his bargain or stop him from repudiating it.<sup>95</sup> It has been said, indeed, that a misrepresentation in a contract which will entitle the party misled to a rescission must have been made at the very time of making the contract and as a part of the same transaction.<sup>96</sup> This rule is perhaps too strict. But at any rate it is clear that the falsity of a representation made to a party on a former occasion and for a different purpose cannot be

Bethell, 92 Ind. 318; *Travelers' Protective Ass'n v. Smith* (Ind.) 101 N. E. 817; *Schnelder v. Schnelder*, 125 Iowa, 1, 98 N. W. 159; *Epp v. Hinton*, 91 Kan. 513, 138 Pac. 576, L. R. A. 1915A, 675; *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 21; *Busch v. Busch*, 12 Daly (N. Y.) 476; *Anderson v. Heasley*, 95 Kan. 572, 148 Pac. 738.

<sup>92</sup> *Schnelder v. Schnelder*, 125 Iowa, 1, 98 N. W. 159.

<sup>93</sup> *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 21.

<sup>94</sup> *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

<sup>95</sup> *Belding v. King*, 159 Fed. 411, 86 C. C. A. 391; *Clayton v. Cavender*, 1 Marv. (Del.) 191, 40 Atl. 956; *Merlweather v. Herran*, 8 B. Mon. (Ky.) 162; *Soule v. Harrington*, 135 Mich. 155, 97 N. W. 357; *Moore v. Hinsdale*, 77 Mo. App. 217; *Schelling v. Bischoff*, 59 N. Y. Super. Ct. 562, 13 N. Y. Supp. 600; *Willets v. Poor*, 141 App. Div. 743, 126 N. Y. Supp. 926; *Hart v. Walsh*, 84 Misc. Rep. 421, 146 N. Y. Supp. 235; *McNelle v. Cridland*, 6 Pa. Super. Ct. 428; *Campbell v. Rushing* (Tex. Civ. App.) 141 S. W. 133; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 56, 69 N. W. 820.

<sup>96</sup> *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705. See *Chilson v. Houston*, 9 N. D. 498, 84 N. W. 354.



relied on as a ground for rescinding a contract.<sup>97</sup> Thus, where, in pursuance of representations made by plaintiff's agent, defendants drew up a contract and submitted it to plaintiffs, but the proposal was rejected and a new contract proposed, which was accepted, and which was not based on the representations of the agent, it was held that evidence was not admissible of the fraudulent character of such representations.<sup>98</sup> So, where a merchant has sold goods at various times to the same purchaser, fraud justifying the rescission of goods bought at one time will not be sufficient to authorize the recovery of goods bought at another time, when the latter sale was free from fraudulent concealment or representation.<sup>99</sup> On the same principle, false representations made by a purchaser of property, to induce the vendor to accept or to carry his notes for the price, are not sufficient ground to rescind the original contract of sale.<sup>100</sup> And conversely, a false representation made after the bargain has been concluded and a note given for the price is no defense in an action on the note.<sup>101</sup> But some transactions are not completed, in this sense, until written evidences have been delivered. Thus, one who has deceived a person and misled him into taking a life insurance policy, different from that bargained for, cannot purge the transaction of the deceit by reading the paper to him before delivering it, if he saw that the policy holder was still under the false impression previously created.<sup>102</sup>

More difficult questions arise where the representations alleged to be fraudulent were made a long time before the bargain was struck or the purchase made. It is clearly not necessary that the contract should have been made, property transferred, or goods sold, immediately after the false representations were made, if the injured party continued

<sup>97</sup> *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733; *Belding v. King*, 159 Fed. 411, 86 C. C. A. 391.

<sup>98</sup> *Simpson v. Crane*, 149 Mich. 352, 110 N. W. 1081.

<sup>99</sup> *Pelham v. Chattahoochie Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19. But see *Chisholm v. Elsenhuth*, 69 App. Div. 134, 74 N. Y. Supp. 496.

<sup>100</sup> *Harding v. Lloyd*, 3 Pa. Super. Ct. 293.

<sup>101</sup> *Flour City Nat. Bank v. Grover*, 88 Hun, 4, 34 N. Y. Supp. 496.

<sup>102</sup> *McKindly v. Drew*, 71 Vt. 138, 41 Atl. 1039.

to rely upon them, and had no reason to entertain a doubt of them, and no fresh sources of information,<sup>103</sup> and the fact that goods were sold on credit, for example, six months or even a year after the making of the false representations, is not necessarily fatal to the right to rescind the sale.<sup>104</sup> But the question whether such a time has elapsed that the vendor of property is no longer justified in relying on representations previously made depends on the circumstances and cannot be fixed by any arbitrary rule.<sup>105</sup> It is for the jury to consider the lapse of time, along with other facts, in order to determine whether or not the contract was made on the faith of the representations.<sup>106</sup> At the same time, a vendor cannot shut his eyes to subsequent reports made by commercial agencies tending to cast suspicion on the financial ability and credit of one with whom he deals, and rely on statements made by such person a year before.<sup>107</sup>

It has also been ruled that, in the case of continuous dealings between the parties, of the same general character, the one is justified in continuing to rely upon representations made by the other, though long antecedent to the particular transaction sought to be rescinded.<sup>108</sup> But where a representation concerning the credit and responsibility of a purchaser of goods referred to a special order for a definite sum, and the goods were delivered and paid for, it was held that the vendor was not entitled to rely on such representations in making another sale on credit five months later.<sup>109</sup> And again, if a merchant or trader makes a truthful representation of his standing or financial resources to a commercial agency, and thereby obtains credit, and a considerable time elapses, and no new representations are made, and fresh purchases are made or other transactions

<sup>103</sup> *Obney v. Obney*, 26 Pa. Super. Ct. 122; *Mashburn v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97.

<sup>104</sup> *Levy v. Abramsohn*, 39 Misc. Rep. 781, 81 N. Y. Supp. 344; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

<sup>105</sup> *Mashburn v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97.

<sup>106</sup> *Waldrop v. Wolff*, 114 Ga. 610, 40 S. E. 830.

<sup>107</sup> *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330.

<sup>108</sup> *Coffin v. Hollister*, 31 Hun (N. Y.) 81; *Goldsmith v. Stern* (Sup.) 84 N. Y. Supp. 869; *Kline v. Baker*, 99 Mass. 253.

<sup>109</sup> *Lesem v. Miller*, 10 Kan. App. 579, 62 Pac. 538.

entered into, after his condition has changed, he cannot be charged with actual fraud unless he knows, or the circumstances are such that he should know, that credit is extended to him on the strength of the original rating given him by the agency.<sup>110</sup> But the case is different where a vendee obtains a line of credit by making a written financial statement, and agrees that it shall be considered as a continuing statement on every purchase of goods thereafter until advised to the contrary, or that he will give notice of any change in his financial condition. Here, if the statement afterwards becomes false, within his knowledge, and he gives no notice to the vendor, and the latter sells him goods in reliance on such statement, the vendor may rescind the sale and recover the goods.<sup>111</sup>

§ 74. **Waiver as to Representations Not Embodied in Contract.**—Fraudulent representations and oral misstatements, made with intent to deceive, are not so merged in a written instrument procured by means of them that they may not justify a rescission or be made the basis of a decree to set it aside.<sup>112</sup> But where a written contract stipulates that it is made upon the basis of the representations and statements contained in it, and no others, it is not a valid defense to an action for money claimed to be due under it that the party entered into the agreement by reason of false representations made by the other party, the same not being contained in the contract, where he was not deceived or misled as to its contents.<sup>113</sup> This does not ap-

<sup>110</sup> *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330; *Strickland v. Willis* (Tex. Civ. App.) 43 S. W. 602; *Sprague, Warner & Co. v. Kempe*, 74 Minn. 465, 77 N. W. 412; *Reid, Murdoch & Co. v. Kempe*, 74 Minn. 474, 77 N. W. 413.

<sup>111</sup> *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Howell v. Berger*, 19 Misc. Rep. 315, 44 N. Y. Supp. 259.

<sup>112</sup> *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Hough v. Richardson*, 3 Story, 659, Fed. Cas. No. 6,722; *Watson v. Reed*, 129 Ala. 388, 29 South. 837; *McKinley Music Co. v. Glymph*, 100 S. C. 200, 84 S. E. 715.

<sup>113</sup> *Equitable Mfg. Co. v. Biggers*, 121 Ga. 381, 49 S. E. 271; *J. I. Case Threshing Mach. Co. v. Broach*, 137 Ga. 602, 73 S. E. 1063; *Friedman v. Pierce*, 210 Mass. 419, 97 N. E. 82; *Brown v. Dobson*, 198 Pa. 487, 48 Atl. 415. Compare *J. I. Case Threshing Mach. Co. v. Feezer*, 152 N. O. 516, 67 S. E. 1004; *Bent v. Fernald*, 159 Ill. App. 552.

ply, however, where there has been a fraudulent substitution as to the subject-matter or as to the form of instrument to be delivered. Thus, for instance, the oral fraudulent representations of an insurance agent, taking the application for a policy, as to the terms of the policy to be issued under it, will constitute a ground for rescission by the insured, although the form of application (or the policy itself) provides that no statements, promises, or information made or given by the agent shall bind the company or affect its rights, unless reduced to writing and included in or presented with the application.<sup>114</sup>

**§ 75. Representations Made Ultra Vires.**—Where the fraudulent misrepresentations alleged as a ground for relief were made by a corporation, it is important to inquire whether, in making them, it was acting within or without the scope of its lawful powers at common law or by statute; for if the making of the representations was ultra vires, it cannot be held liable. Thus, under the laws of New York, a trust company cannot be held responsible for false statements contained in a prospectus which it has issued for the purpose of encouraging the purchase of securities in a business venture. Such an act is ultra vires, and the fact that the banking law of that state does not expressly forbid such a company to issue such a prospectus does not warrant the inference that it is permitted.<sup>115</sup> So a national bank has no authority to guaranty the payment of a merchant's bills for goods bought by him, and where he presents a written guaranty to that effect, executed by a national bank, even if it implies a representation that the bank is financially sound, there is not such a case of fraudulent representations as will justify a rescission of the sale, since the seller is bound to know that such a guaranty is ultra vires of the bank and void.<sup>116</sup> Again, persons dealing with a county are bound to know the extent of its powers and cannot hold it liable

<sup>114</sup> *McCarty v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426; *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053.

<sup>115</sup> *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. Rep. 303, 118 N. Y. Supp. 758.

<sup>116</sup> *Commercial Nat. Bank v. Pirie*, 82 Fed. 799, 27 C. C. A. 171.

for false representations made by its officers as to matters not within its powers, nor for the breach of contracts which they had no authority to make.<sup>117</sup>

§ 76. **Expressions of Opinion.**—Fraud cannot be predicated upon the expression of a mere opinion, however inaccurate or erroneous it may prove to be. That is to say, a fraudulent “representation,” such as will justify the rescission of a contract or the cancellation of a written instrument, must be a direct and positive assertion of a material fact, and not a statement which is put forward merely as the judgment, estimate, or opinion of the party making it, or a statement which, from the nature of the case, can be nothing more than an opinion.<sup>118</sup> This rule rests upon several considerations. In the first place, it is neither fair nor logical to presume that a person, entering into a business transaction of any importance, would place his reliance

<sup>117</sup> *Sandeen v. Ramsey County*, 109 Minn. 505, 124 N. W. 243.

<sup>118</sup> *Dotson v. Kirk*, 180 Fed. 14, 103 C. C. A. 368; *Robinson v. Cathcart*, 3 Cranch, C. C. 377, Fed. Cas. No. 11,947; *Ryan v. Batchelor*, 95 Ark. 375, 129 S. W. 787; *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804; *Johnson v. Withers*, 9 Cal. App. 52, 98 Pac. 42; *Huffstetler v. Our Home Life Ins. Co.*, 67 Fla. 324, 65 South. 1; *Wrenn v. Truitt*, 116 Ga. 708, 43 S. E. 52; *Payne v. Smith*, 20 Ga. 654; *Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15; *Potter v. Gibson*, 184 Ill. App. 112; *Burwash v. Ballou*, 132 Ill. App. 71, affirmed, 230 Ill. 34, 82 N. E. 355, 15 L. R. A. (N. S.) 409; *Press v. Hair*, 133 Ill. App. 528; *Emmerson v. Hutchinson*, 63 Ill. App. 203; *Swanson v. Fisher*, 148 Ill. App. 104; *Maywood Stock Farm Importing Co. v. Pratt* (Ind. App.) 110 N. E. 243; *Williams v. Wilson*, 101 Ill. App. 541; *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833; *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422; *Baldwin v. Moser* (Iowa) 123 N. W. 989; *Else v. Freeman*, 72 Kan. 666, 83 Pac. 409; *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723; *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Stacey v. Robinson*, 184 Mo. App. 54, 168 S. W. 261; *Williamson v. Harris*, 167 Mo. App. 347, 151 S. W. 500; *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116, 86 N. W. 913; *Wilson v. Renner*, 85 N. J. Law, 340, 89 Atl. 758; *Levin v. Sweet*, 147 App. Div. 894, 132 N. Y. Supp. 110; *Hazlett v. Wilkin*, 42 Okl. 20, 140 Pac. 410; *Peck, Phillips & Wallace Co. v. Stevenson*, 6 Pa. Super. Ct. 536; *Wynne v. Allen*, 7 Baxt. (Tenn.) 312, 32 Am. Rep. 562; *Worrell v. Kinnear Mfg. Co.*, 103 Va. 719, 49 S. E. 938, 2 Ann. Cas. 997; *Campbell v. Eastern Building & Loan Ass'n*, 98 Va. 729, 37 S. E. 350; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Aurora Land Co. v. Keegan*, 67 Wash. 305, 121 Pac. 469; *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142; *Benolkin v. Guthrie*, 111 Wis. 554, 87 N. W. 466.

upon a statement which he knows is nothing more than the opinion of the other party. In the next place, it would not accord with justice to impose the penalties of fraud upon one merely because his opinion or judgment proves to have been mistaken. If he undertakes to make positive assertions in regard to matters of fact, he may be presumed to know that he will be held responsible; and if he willfully misstates the facts with a fraudulent intention, there should clearly be a remedy for the party defrauded. But mere opinions are too speculative and unsubstantial to be visited with such consequences. Finally, the homely proverb applies that "one man's opinion is as good as another's." If the matter is one which rests in opinion, each party should form his own judgment, and not rely on that of the other. If the facts upon which an opinion must be based are equally open to the investigation of both, a party cannot claim to have been deceived because he accepted the other's judgment. And if the facts are not equally open to them, but rest in the exclusive or peculiar knowledge of the one, then the other should make inquiry of him, not as to his opinion but as to the facts, and the answers which he receives will then come within the definition of representations of fact. Thus it has been said: "It is not every erroneous representation that will avoid a contract. To have that effect it must be as to a fact material in the transaction, not mere opinion. It must be a representation of a material matter upon which the party whom it affects injuriously had a right to rely and did rely. If the representation be mere matter of opinion, or of a fact equally within the knowledge of both parties, or one upon which the party had no right to rely, the representation, though acted on, will not vitiate the transaction. This is always the case where the parties are mutually cognizant of the facts acted on, or stand on an equal footing in relation to them, and there exists no fiduciary relation between them. The law will not lend its aid to help one thus situated and advised, if he voluntarily neglects to protect himself by the exercise of his common sense."<sup>119</sup> So, in another case, it is ruled that a statement

<sup>119</sup> *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

of intention merely, or simply the expression of an opinion held by the party making it, cannot be a misrepresentation amounting to fraud. A party to whom an opinion is expressed is presumed to be equally able to form his own opinion, and the expression of an intention is no more in effect than a statement that a present opinion exists. In neither case is there any affirmation of an external fact.<sup>120</sup>

It will be shown in a later section that statements in regard to the value of anything are ordinarily regarded as estimates or opinions, rather than as assertions of facts.<sup>121</sup> And this is also frequently true of statements in regard to the kind or quality of the thing which is the subject of the contract.<sup>122</sup> Thus, where a book agent, selling a set of books, speaks of them as "nice books" and "books that children would love to read," it is the mere expression of his opinion, and not a misrepresentation in law, though the books may be far from "nice" and utterly unsuited for children.<sup>123</sup> So it is an expression of opinion, and not a representation of fact, when the vendor of land states that the fruit trees on it are of fine grade or of "fancy" varieties,<sup>124</sup> or gives an estimate of the amount of timber standing on the land,<sup>125</sup> or of the quantity of land which could be put under cultivation, or the quantity of waste or untillable land,<sup>126</sup> or where a person soliciting subscriptions for the establishment of a college expresses his opinion as to the effect which the location of it will have in increasing the value of property in its vicinity.<sup>127</sup> So it may be important for a person to have information in regard to a certain town or city, as, for instance, to enable him to judge of the market which it will afford for certain goods, the support it may afford to a given enterprise, or its desirability as a

<sup>120</sup> *Hartman v. International Bldg. & Loan Ass'n*, 28 Ind. App. 65, 62 N. E. 64.

<sup>121</sup> *Infra*, § 79. And see *Murphy v. Murphy*, 78 Misc. Rep. 178, 137 N. Y. Supp. 872; *Ranch v. Lynch*, 4 Boyce (Del.) 446, 89 Atl. 134.

<sup>122</sup> *Doylestown Agr. Co. v. Brackett, Shaw & Lunt Co.*, 109 Me. 301, 84 Atl. 146.

<sup>123</sup> *Barrie v. Jerome*, 112 Ill. App. 329.

<sup>124</sup> *Woodson v. Winchester*, 16 Cal. App. 472, 117 Pac. 565.

<sup>125</sup> *Belka v. Allen*, 82 Vt. 456, 74 Atl. 91.

<sup>126</sup> *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260.

<sup>127</sup> *Chambers v. Baptist Education Soc.*, 1 B. Mon. (Ky.) 215.



place of residence for himself. But statements made to him in relation to its population, the extent and character of its business, or the salubrity of its climate, are ordinarily regarded as expressions of opinion rather than representations of facts.<sup>128</sup> And it is said to be "well understood that, in the absence of fraud, a statement as to the speed of a vessel, as well as with respect to the quality of an article sold, must be deemed a mere expression of opinion and not a contract of warranty."<sup>129</sup> But a statement made to induce the purchase of mining land, that the ground had not been mined and that it had been prospected to the ore without removing any of it, is a representation of fact.<sup>130</sup>

Statements in regard to the advantages of the bargain offered or concerning the interest of the party in accepting it, like estimates of value, are generally matters of opinion. Thus, representations to a vendor of coal land by the purchaser thereof, that he had bought part of the adjoining coal lands and intended to buy the rest, and that it was to the vendor's interest to sell, because if he did not until all the coal around him had been sold, he might not have an opportunity to do so, are not fraudulent in character so as to justify a rescission of the sale.<sup>131</sup> And a broker's representation that a certain price was the lowest that his principal would accept for the property, though untrue, is only his estimate or expression of opinion, for which he cannot be held liable in an action for fraud.<sup>132</sup> And so of a statement by a promoter that he cannot sell certain stock unless the owner will take it out of a pool into which he has put it and assign it to the promoter.<sup>133</sup> But representations as to the terms of an existing contract between defendants and an underwriter for the disposal of corporate stock, and of de-

<sup>128</sup> *Donnelly v. Baltimore Trust & Guarantee Co.*, 102 Md. 1, 61 Atl. 301. But see *Marshall v. Seelig*, 49 App. Div. 433, 63 N. Y. Supp. 355.

<sup>129</sup> *The Hurstdale* (D. C.) 169 Fed. 912.

<sup>130</sup> *Kendrick v. Ryus*, 225 Mo. 150, 123 S. W. 937, 135 Am. St. Rep. 585.

<sup>131</sup> *Foster v. Illinois Zinc Co.*, 232 Ill. 349, 83 N. E. 859. But compare *Dolan v. Cummings*, 116 App. Div. 787, 102 N. Y. Supp. 91.

<sup>132</sup> *Bradley v. Oviatt*, 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828.

<sup>133</sup> *Leszynsky v. Ross*, 35 Misc. Rep. 652, 72 N. Y. Supp. 352.



fendants' opinion as to the number of shares which would be in a pool in which plaintiff was interested, which representations induced the plaintiff to enter into a contract with defendants fixing his profits, were held to be representations of fact.<sup>184</sup> Statements in regard to the legal construction of a contract or other instrument or its effect in law, or as to the progress or outcome of a pending suit, and other matters of law, are regarded as no more than opinions, within the meaning of this rule, at least when given by men who are not lawyers and who do not profess to repeat the opinions of a lawyer.<sup>185</sup> Thus, where plaintiff's agent, while soliciting an order for machinery, stated that the buyers could not be compelled to take certain machinery previously ordered from others, as the order had not been legally approved, such statement was held a mere matter of opinion, on which the buyers had no right to rely.<sup>186</sup> And even where statements are made on such matters by an attorney, they are not always to be taken as representations of fact. Thus, in a case in New York, it was held that representations by an attorney, that, in order to adjust the financial difficulties of a corporation, it would be necessary for him to have the legal title to its property and assets, were not ground for avoiding the contract, though false and fraudulent, being matters merely of opinion.<sup>187</sup>

But the fact that fraudulent representations, sufficient to render the party making them liable for deceit, were mingled with expressions of opinion is no defense for him.<sup>188</sup> And a charge of fraud may be predicated upon a false representation relating partly to matters of fact and partly to matters of opinion, where it is alleged that the loss ensued through acting on the representation as to the fact.<sup>189</sup> Finally, it is often a question whether a particular statement was intended by the one party and understood by the

<sup>184</sup> *Spier v. Hyde*, 92 App. Div. 467, 87 N. Y. Supp. 285.

<sup>185</sup> *Rutter v. Hanover Fire Ins. Co.*, 138 Ala. 202, 35 South. 33; *Frankfort Marine, Accident & Plate Glass Ins. Co. v. Witty*, 208 Pa. 569, 57 Atl. 990.

<sup>186</sup> *Nicholas & Shepard Co. v. Horstad*, 21 S. D. 80, 109 N. W. 509.

<sup>187</sup> *McNulty v. Gilbert*, 154 App. Div. 297, 138 N. Y. Supp. 996.

<sup>188</sup> *Baker v. Crandall*, 7 Mo. App. 564.

<sup>189</sup> *Whitaker v. State*, 11 Ga. App. 208, 75 S. E. 258.

other as an assertion of a fact or as the expression of an opinion; and a question of this kind is for the determination of the jury.<sup>140</sup>

**§ 77. Tests for Distinguishing Expressions of Opinion from Representations of Fact.**—It may be said in general that statements of fact are expressions of opinion, and not representations, when the truth or falsity of the matter cannot be presently ascertained because it is in the nature of a prediction, which can only be verified by the course of future events, as, for instance, a statement that given land will produce good crops, that future dividends will be paid, that shares in a building association will mature in a given time,<sup>141</sup> that one undertaking a task of a personal nature can complete it within a limited time,<sup>142</sup> that a note will be met promptly at its maturity,<sup>143</sup> that a certain trade can be learned in eight weeks,<sup>144</sup> or that the freight on a certain piece of machinery will not exceed a certain amount.<sup>145</sup> Again, statements are to be regarded as expressions of opinion, rather than as representations of facts, where their truth or falsity cannot be definitely ascertained, though all the elements to be taken into consideration are matters of the present time, because the matter is not one which can be reduced to a mathematical certainty, but one as to which different men, equally cognizant of all the elements of the problem, might honestly arrive at different conclusions.<sup>146</sup> In such a case as this, it is not a fraudulent misrepresentation even if the party making the statement asserts it as a matter within his own knowledge, because it must be ap-

<sup>140</sup> *Parker v. Boyd*, 108 Ark. 32, 156 S. W. 440.

<sup>141</sup> See, *infra*, § 86. But a representation that a second-hand automobile is "in good running order," made to induce its purchase, and fairly susceptible of being understood as a statement of fact, and so taken by the buyer, is actionable fraud if false. *Ross v. Reynolds*, 112 Me. 223, 91 Atl. 952.

<sup>142</sup> *Chamberlayne v. American Law Book Co.* (C. C.) 148 Fed. 316.

<sup>143</sup> *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47.

<sup>144</sup> *Vilett v. Moler*, 82 Minn. 12, 84 N. W. 452.

<sup>145</sup> *Merchants' Nat. Bank v. Brisch*, 140 Mo. App. 246, 124 S. W. 76.

<sup>146</sup> *Ryan v. Batchelor*, 95 Ark. 375, 129 S. W. 787; *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81; *McCormick v. Jordon*, 65 W. Va. 86, 63 S. E. 778; *Littlejohn v. Sample*, 173 Mich. 419, 139 N. W. 38.

parent from the subject-matter that what is thus stated as knowledge must be considered and understood, by the party to whom it is addressed, as nothing more than an expression of strong belief.<sup>147</sup> For the same reason, a matter which must depend upon individual taste, preference, or judgment cannot be stated as a fact or as anything more than an opinion. For example, to tell an intending purchaser of a painting that it is the work of a certain celebrated artist is a representation of fact, but to assure him that it is a pleasing subject, that it will be a constant enjoyment to him, that his friends will admire it, etc., is stating an opinion. So a statement by the seller of a set of books that they are "fine reading," "books that children will love to read," or "fit for everybody," is merely a matter of opinion,<sup>148</sup> while an assertion that the books are a special, limited, extra-illustrated edition is a representation of fact.<sup>149</sup>

Again, it is an expression of opinion, and not a representation of fact, where the existence or non-existence of the matter spoken of, as a present fact, is capable of physical determination, but has not yet been definitely ascertained, and there is no existing evidence in its favor or against it except such indications of the probability or improbability of its existence as might legitimately give rise to a belief or opinion, but would not warrant a positive assertion. Thus, where the subject of sale is a mine, and it has been prospected and indications of ore have been found, but it has not been sufficiently developed or tested to disclose anything positive in regard to the extent of the ore body, an assertion in regard to the tonnage of available ore, the number or direction of the veins, or the value of the mine as compared with other known producing properties, cannot be regarded as a representation on which reliance may be placed, but is merely a statement of opinion or belief.<sup>150</sup> So, a statement by a real-estate broker that a certain named price is

<sup>147</sup> *Page v. Bent*, 2 Metc. (Mass.) 371.

<sup>148</sup> *St. Hubert Guld v. Quinn*, 64 Misc. Rep. 336, 118 N. Y. Supp. 582; *Barrie v. Jerome*, 112 Ill. App. 329.

<sup>149</sup> *Schulthels v. Sellars*, 223 Pa. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210.

<sup>150</sup> *Lynch's Appeal*, 97 Pa. 349; *Fisher v. Seitz*, 172 Mo. App. 162, 157 S. W. 883; *Garrett v. Slavens*, 129 Iowa, 107, 105 N. W. 369.

the lowest that his principal will take for the land, is only his estimate or opinion, for which he cannot be held liable though it proves to have been mistaken.<sup>151</sup> On the same principle, it is held that a buyer is not liable to an action for deceit for misrepresenting the seller's chance of sale or the probability of his getting a better price for his commodity than the price which such proposed buyer offers. On this point, Lord Ellenborough said: "I am not aware of any case or recognized principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely gratis dictum by a bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely."<sup>152</sup>

But where the party making the assertion has definite and positive knowledge that the fact does or does not exist (as distinguished from a mere belief) his statement in regard to it cannot be regarded as an "opinion," for legal purposes, whatever he may call it.<sup>153</sup> Thus, where one selling a dairy gave the purchaser a written statement as to the business done, the fact that he referred to his representation as an "estimate" and prefaced it by the words "I think" will not prevent a recovery as for fraud, if he intended the buyer to understand that such representations were statements of actual facts taken from his books.<sup>154</sup> And matters which might otherwise be expressions of opinion may become the basis for an action for fraud, when stated as accomplished facts by one of the parties to the contract and

<sup>151</sup> *Bradley v. Oviatt*, 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828. But compare *Hokanson v. Oatman*, 165 Mich. 512, 131 N. W. 111, 35 L. R. A. (N. S.) 423.

<sup>152</sup> *Vernon v. Keys*, 12 East, 632.

<sup>153</sup> *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *Carr v. Sanger*, 138 App. Div. 32, 122 N. Y. Supp. 593; *Frank v. Bradley & Currier Co.*, 42 App. Div. 178, 58 N. Y. Supp. 1032; *Blumenfeld v. Wagner*, 63 Misc. Rep. 69, 116 N. Y. Supp. 500; *D. H. Baldwin & Co. v. Moser*, 155 Iowa, 410, 136 N. W. 195. And see *George W. Saunders Live Stock Commission Co. v. Kincaid* (Tex. Civ. App.) 168 S. W. 977; *Turk v. Botsford*, 70 Or. 198, 139 Pac. 925.

<sup>154</sup> *Stone v. Pentecost*, 206 Mass. 505, 92 N. E. 1021.

accepted and relied on as such by the other.<sup>155</sup> In effect, numerous authorities hold that that which is properly or intrinsically matter of opinion may amount to an affirmation, and be an inducement to the making of a contract, when the parties are not dealing upon equal terms, and one of them has, or is presumed to have, means of information not equally open to the other.<sup>156</sup> In a work of accepted authority it is said: "The test by which to determine whether a representation is a mere expression of an opinion or a substantive fact is this: If the representation is as to a matter not equally open to both parties, it may be said to be a statement of a fact as such, but if it is as to a matter that rests merely in the judgment of the person making it, and the means of deriving information upon which a fair judgment can be predicated are equally open to both parties, and there is no artifice or fraud used to prevent the person to be affected thereby from making an examination and forming a judgment in reference to the matter for himself, the representation is a mere expression of an opinion, and, however incorrect, does not support an action for fraud. Generally statements as to the value of property, real or personal, which the purchaser has an opportunity to inspect for himself, and in reference to which, upon reasonable inquiry, he could ascertain facts upon which to predicate a fair judgment, are mere expressions of opinion, and, however erroneous or false even, are not actionable. . . In reference to all such matters, where the opportunities for information are equally within the reach of both, the doctrine of *caveat emptor* applies."<sup>157</sup>

**§ 78. False Opinion Fraudulently Asserted.**—What is said in the foregoing sections relates to expressions of opinion which are shown by the result to have been mistaken or incorrect. But the case is different with regard to a false

<sup>155</sup> *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477.

<sup>156</sup> *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; *Fitzgerald v. Frankel*, 109 Va. 603, 64 S. E. 941; *Ginn v. Almy*, 212 Mass. 486, 99 N. E. 276; *Turk v. Botsford*, 70 Or. 198, 139 Pac. 925; *Welch v. McGlinchy*, 109 Me. 583, 85 Atl. 942.

<sup>157</sup> 2 Add. Torts (Wood's edn.) § 1186, note.

opinion fraudulently expressed. This is actual fraud justifying rescission or relief in equity. That is to say, if a person makes a statement for the fraudulent purpose of deceiving another and thereby inducing him to enter into a contract or assume an obligation, it is a fraudulent misrepresentation warranting relief to the party defrauded, although the statement relates to that which is properly matter of opinion rather than matter of fact, or although the person expressing it puts it forward as his opinion, if he knows it to be false or does not believe it to be true, or if he does not in reality hold any such opinion or holds a contrary opinion.<sup>158</sup> In other words, the rule that no one is liable for an expression of opinion is applicable only when the opinion stands by itself as a distinct thing and when it is not given in bad faith with knowledge of its untruthfulness and with an intent to defraud.<sup>159</sup> Thus, for example, if a person who has suffered personal injuries in an accident and who has a just claim for damages is offered a certain sum in settlement of his claim, and accepts it and executes a release, relying entirely on what the defendant's own physician tells him of the nature and probable duration of his injuries, the good or bad faith of the physician becomes vitally important; and if it can be shown that the opinion which he so expressed to the patient was not his real opinion, but was false, it will be sufficient ground for avoiding the release.<sup>160</sup>

<sup>158</sup> *Hingston v. L. P. & J. A. Smith Co.*, 114 Fed. 294, 52 C. C. A. 206; *Griel v. Lomax*, 94 Ala. 641, 10 South. 232; *Wall v. Graham* (Ala.) 68 South 298; *Moon v. Benton* (Ala. App.) 68 South. 589; *Hockensmith v. Winton*, 11 Ala. App. 670, 66 South. 954; *MacDonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73; *Phelps v. Grady*, 168 Cal. 73, 141 Pac. 926; *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125; *Henry v. Continental Bldg. & Loan Ass'n*, 156 Cal. 667, 105 Pac. 960; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Snively v. Melxsell*, 97 Ill. App. 365; *Scott v. Burnight*, 131 Iowa, 507, 107 N. W. 422; *Schnelder v. Schnelder*, 125 Iowa, 1, 98 N. W. 159; *Jackson v. Collins*, 39 Mich. 557; *Pate v. Blades*, 163 N. C. 267, 79 S. E. 608; *Sleeper v. Smith*, 77 N. H. 337, 91 Atl. 866; *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915; *Houston v. Darnell Lumber Co.* (Tex. Civ. App.) 146 S. W. 1061; *Grim v. Byrd*, 32 Grat. (Va.) 293. Compare *Johansson v. Stephanson*, 154 U. S. 625, 14 Sup. Ct. 1180, 23 L. Ed. 1009.

<sup>159</sup> *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422.

<sup>160</sup> *Texas & P. Ry. Co. v. Jowers* (Tex. Civ. App.) 110 S. W. 946.

So, where a breach of contract by a seller of cattle is relied on, and the buyer shows that the seller merely expressed an opinion as to the character of the cattle, still the buyer may recover if he alleges and proves that the seller knowingly and willfully misrepresented his opinion.<sup>161</sup>

§ 79. **Representations as to Value.**—As a general rule, statements in regard to the value of that which constitutes the subject of a sale or other contract are not regarded in law as representations of fact such as to justify rescission or relief in equity, if false, but merely as expressions of opinion, which do not bind the party making them and on which the other party has no right to rely.<sup>162</sup> If the article

<sup>161</sup> *O'Brien v. Von Lienen* (Tex. Civ. App.) 149 S. W. 723.

<sup>162</sup> *Patent Title Co. v. Stratton* (C. C.) 89 Fed. 174; *Gardner v. Knight*, 124 Ala. 273, 27 South. 298; *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76; *Wegerer v. Jordan*, 10 Cal. App. 362, 101 Pac. 1066; *Patterson v. Barrie*, 30 App. D. C. 531; *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32; Civ. Code Ga. 1910, § 4582; *Evans v. Gerry*, 174 Ill. 595, 51 N. E. 615; *Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997; *Auman v. McKibben*, 179 Ill. App. 425; *Boltz v. O'Conner*, 45 Ind. App. 178, 90 N. E. 496; *Bossingham v. Syck*, 118 Iowa, 192, 91 N. W. 1047; *Bosley v. Monahan*, 137 Iowa, 650, 112 N. W. 1102; *Da Lee v. Blackburn*, 11 Kan. 190; *Else v. Freeman*, 72 Kan. 666, 83 Pac. 409; *Sohan v. Gibson*, 118 Ky. 403, 80 S. W. 1173; *Cain v. Hahn*, 6 Ky. Law Rep. 295; *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409; *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Buxton v. Jones*, 120 Mich. 522, 79 N. W. 980; *Boasberg v. Walker*, 111 Minn. 445, 127 N. W. 467; *Adan v. Steinbrecher*, 116 Minn. 174, 133 N. W. 477; *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377, 51 S. W. 736; *State v. Marion*, 235 Mo. 359, 138 S. W. 491; *Moody v. Baxter*, 167 Mo. App. 521, 152 S. W. 117; *Nostrum v. Halliday*, 39 Neb. 828, 58 N. W. 429; *Realty Inv. Co. v. Shafer*, 91 Neb. 798, 137 N. W. 873; *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275; *Marquis v. Tri-State Land Co.*, 77 Neb. 353, 109 N. W. 397; *Van Slochem v. Villard*, 207 N. Y. 587, 101 N. E. 467; *Graham v. Pancoast*, 30 Pa. 89; *Cote v. Christy*, 10 Pa. Super. Ct. 318; *Long v. Gilbert* (Tenn. Ch. App.) 59 S. W. 414; *Oneal v. Welsman*, 39 Tex. Civ. App. 592, 88 S. W. 290; *Garrett v. Green* (Tex. Civ. App.) 164 S. W. 1105; *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; *O'Day v. Meyers*, 147 Wis. 549, 133 N. W. 605. And see *Mertins v. Hubbell Pub. Co.*, 190 Ala. 311, 67 South. 275; *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 South. 1015; *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485; *Everist v. Drake*, 26 Colo. App. 273, 143 Pac. 811; *Walker v. Story*, 14 Ga. App. 803, 82 S. E. 355; *Stotts v. Fairfield*, 163 Iowa, 726, 145 N. W. 61; *Bennett Savings Bank v. Smith* (Iowa)



sold or contracted for is one of a class of commodities ordinarily dealt in, its value is its market price, and that is readily ascertainable, so that no one should permit himself to be deceived by what another may tell him. If it is unique, or not one of a class, its value is almost wholly a matter of judgment and estimate, so that a statement in relation to its value made by either party cannot be taken as anything else than the expression of his personal opinion. It is not fraudulent for a seller to praise his goods, and some exaggeration as to their value is to be expected. And on the other hand, one who approaches an owner with an offer for his property is not to be charged with fraud because he bargains shrewdly and affects to depreciate the value of that which is the subject of the sale.

In a case in Alabama, in an action to recover the price of land sold, the defense of false representations was set up. The purchaser testified that the vendor's agent said "they considered the land one of the finest sections they had on the mountain," and when asked how it compared with the land they were standing on, he replied that "if there is any difference, it is better than this"; and when the purchaser objected to buying the land without seeing it, the agent said that he "could trust his word," and that he was well acquainted with the land, and that the purchaser would be well satisfied with it. It was held that this was merely an expression of opinion, and not a positive representation of fact.<sup>168</sup> In another case, a company which was selling out its property and business transferred to plaintiff its balances of accounts against its various agents as shown by its books. A list of such balances was made and shown to plaintiff, and in reply to an inquiry, an officer of the com-

152 N. W. 717; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Hall v. Brown*, 126 Md. 169, 94 Atl. 530; *Mount v. Lolzeaux*, 86 N. J. Law, 511, 92 Atl. 593; *Hatton v. Cook*, 166 App. Div. 257, 151 N. Y. Supp. 577; *Mecum v. Becker*, 166 App. Div. 793, 152 N. Y. Supp. 385; *A. S. Cameron Steam Pump Works v. Lubbock Light & Ice Co.* (Tex. Civ. App.) 167 S. W. 256; *Garrett v. Green* (Tex. Civ. App.) 164 S. W. 1105. Compare *Barnes v. Barnett*, 188 Ill. App. 32; *Rodee v. Seaman*, 33 S. D. 184, 145 N. W. 441; *Scribner v. Palmer*, 81 Wash. 470, 142 Pac. 1166.

<sup>168</sup> *Stevens v. Alabama State Land Co.*, 121 Ala. 450, 25 South. 995.



pany stated that they had charged off the bad accounts and that those remaining were "better than the ordinary." No representation was made as to the solvency of the persons charged or as to the collectibility of the accounts. It was held that such statement was merely an expression of opinion, and that the company could not be held liable as for deceit because some of the accounts were disputed and offsets were claimed against others.<sup>164</sup> Again, the statement of an agent selling goods that the price charged is cheaper than the buyer could procure the goods elsewhere, is an opinion, and does not invalidate the contract, though false.<sup>165</sup> And an agreement by which the defendant undertook to pay the plaintiff a commission if he would procure a purchaser for defendant's land at an agreed price is not to be avoided merely because the plaintiff represented to the purchaser that the property was worth more than the amount defendant was willing to take for it, and could not be obtained for a less sum.<sup>166</sup> So also, statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the value of the mine, if they turn out to be untrue, are not necessarily or ordinarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale.<sup>167</sup> Thus, where a person says that a body of ore through which a drill hole has been made is "pay ore," it cannot be treated otherwise than as a mere expression of his opinion that it will pay, and an action for fraud cannot be predicated thereon, though the actual development of the mine shows the opinion to have been unwarranted.<sup>168</sup>

**§ 80. Same; Exceptions to Rule.**—The general rule stated in the preceding section is subject to several impor-

<sup>164</sup> *Pittsburgh Life & Trust Co. v. Northern Central Life Ins. Co.* (C. C.) 140 Fed. 888.

<sup>165</sup> *Mayo v. Latham*, 159 Mich. 136, 123 N. W. 561.

<sup>166</sup> *Hardy v. Stonebraker*, 31 Wis. 640.

<sup>167</sup> *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Craig v. Wade*, 159 Cal. 172, 112 Pac. 891; *Martin v. Eagle Creek Development Co.*, 41 Or. 448, 69 Pac. 216.

<sup>168</sup> *Brown v. South Joplin Lead & Zinc Min. Co.*, 194 Mo. 681, 92 S. W. 699.

tant exceptions. In the first place, if the person making a statement as to value occupies a confidential or fiduciary relation to the other, it is his duty to be perfectly candid, to conceal nothing, and to be strictly accurate in what he says, and if he misrepresents the value of the subject-matter, it is a constructive fraud at least.<sup>169</sup> And a similar principle applies where the party deceived is of weak mind, easily misled and imposed upon,<sup>170</sup> and where the price paid for a thing is so much in excess of the true value as to shock the conscience, the transaction may be set aside, not only on the ground of inadequacy of consideration, but on account of the misrepresentation as to value.<sup>171</sup> Again, we have shown above that the fraudulent expression of a false opinion may be actionable fraud;<sup>172</sup> and this applies where the opinion concerns a question of value. That is, if a statement as to value is made by one who knows it to be false or not consonant with the facts, and which is not his real opinion or judgment, and is asserted for the fraudulent purpose of deceiving the other party and inducing him to contract, and which accomplishes that purpose, it is to be treated as a fraudulent misrepresentation.<sup>173</sup> Indeed, some courts go so far as to hold that if a vendor permits a vendee to contract with him on the faith of his statements of value, he is bound not merely to believe, but to know, that they are true, and it is of no consequence that the vendor believed his statements were true, if they were false in fact.<sup>174</sup> Again, it is laid down as a general rule in several decisions that, while a representation as to value is ordinarily a mat-

<sup>169</sup> *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *State Bank of Iowa Falls v. Brown*, 142 Iowa, 190, 119 N. W. 81, 134 Am. St. Rep. 412; *Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835. And see, *supra*, §§ 40-51.

<sup>170</sup> *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360.

<sup>171</sup> *Billups v. Montenegro-Reihms Music Co.*, 69 W. Va. 15, 70 S. E. 779.

<sup>172</sup> *Supra*, § 78.

<sup>173</sup> *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903; *Stoll v. Wellborn* (N. J. Ch.) 56 Atl. 894; *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889; *Blanks v. Clark*, 68 Ark. 98, 56 S. W. 1063; *Ranch v. Lynch*, 4 Boyce (Del.) 446, 89 Atl. 134; *Wilde v. Oregon Trust & Sav. Bank*, 59 Or. 551, 117 Pac. 807; *Smith v. Anderson*, 74 Or. 90, 144 Pac. 1158.

<sup>174</sup> *Jack v. Hixon*, 23 Pa. Super. Ct. 453.

ter of opinion and therefore not to be deemed fraudulent, yet if it is put forward as an assertion of fact, and with the purpose that it shall be so received, and it is so received, and is relied on by the other party as the inducement to the contract, to his prejudice, it may amount to actual fraud.<sup>175</sup> And where a defendant sold the plaintiff certain goods and agreed that the price charged would be as cheap as they could be bought for anywhere, it was held that the representation as to price was an essential element of the transaction and not mere dealers' talk.<sup>176</sup> Again, while a misrepresentation as to value may not be alone sufficient in the particular case to justify rescission, yet it may be treated like any false assertion of fact when coupled or connected with other fraudulent misrepresentations or concealments.<sup>177</sup> This principle was applied in a case where the purchaser of land falsely stated to the owner that the property had been sold for taxes and at the same time grossly understated its value,<sup>178</sup> and where, in addition to false statements about the value of the property, the vendor procured a third person to make a sham offer for it at an exorbitant price in the purchaser's presence,<sup>179</sup> and where the purchaser of corporate stock, besides assuring the owner that it had no value, stated to him a purely sentimental rea-

<sup>175</sup> *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399; *Snively v. Melxsell*, 97 Ill. App. 365; *Newton v. Ganss*, 7 Tex. Civ. App. 90, 26 S. W. 81; *Dolan v. Cummings*, 193 N. Y. 638, 86 N. E. 1123; *Ganow v. Ashton*, 32 S. D. 458, 143 N. W. 383; *Rodee v. Seaman*, 33 S. D. 184, 145 N. W. 441; *Lanyon v. Chesney*, 186 Mo. 540, 85 S. W. 568; *Van Vleet Fletcher Automobile Co. v. Crowell (Iowa)* 149 N. W. 861; *Randolph v. Togus*, 85 Wash. 332, 148 Pac. 5. Where the buyer of a house stated that he was ignorant of local values and proposed to rely upon the vendor, and the latter thereupon stated as a fact that the house was worth a certain amount, and that its rental value was a certain sum, it was held that this representation was a proper basis for a charge of fraud. *Ross v. Bolte*, 165 Iowa, 499, 146 N. W. 31.

<sup>176</sup> *Stout v. Caruthersville Hardware Co.*, 131 Mo. App. 520, 110 S. W. 619.

<sup>177</sup> *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739; *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668; *Clark v. Robinson*, 58 Me. 133; *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. 1110; *Coulter v. Minlon*, 139 Mich. 200, 102 N. W. 660.

<sup>178</sup> *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753.

<sup>179</sup> *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804.

son as explaining his willingness to buy,<sup>180</sup> and where defendant, representing that he would pay plaintiff part cash for his store and would furnish certain valuable stock as collateral for the remainder, which he would be able to pay a month later, induced plaintiff to sign a bill of sale, when the stock was practically worthless and the defendant did not intend to pay the remainder of the price.<sup>181</sup>

**§ 81. Same; Knowledge or Means of Estimating Value.** A sale cannot be set aside on account of the vendor's representations concerning the value of the subject-matter, however false or exaggerated, if the purchaser was dealing on equal terms with him and either knew as much as he did about the value, or had an opportunity to inspect and appraise the property, or had at his command the means of acquiring all the information necessary to enable him to form a correct judgment, and is not in any way prevented or dissuaded from making his own investigation. In such a case, he is not justified in relying on what the other party may tell him, and if he does, it is at his own risk of loss.<sup>182</sup> As remarked in one of the cases, "the plaintiff had no right to rely on the representation of value as a fact, nor to place any confidence in it. Such representation, however exaggerated, false, and deceptive it may be, is not actionable if the subject of sale be open to the buyer's observation. He is bound to examine or inquire for himself and trust his own judgment, or to take a warranty from the seller."<sup>183</sup> But the relative situation of the parties is not always such as this. The buyer may be ignorant of the value of the object because he is unacquainted with the price of similar objects and has not the opportunity of obtaining independent advice. Or it may require a certain skill, scientific knowledge, or technical training which he does not possess

<sup>180</sup> *Edelman v. Latshaw*, 180 Pa. 419, 36 Atl. 926.

<sup>181</sup> *Auman v. McKibben*, 179 Ill. App. 425.

<sup>182</sup> *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884; *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377, 51 S. W. 736; *McKibbin v. Day*, 71 Neb. 280, 98 N. W. 845; *Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 806; *Long v. Kendall*, 17 Okl. 70, 87 Pac. 670; *Elgin v. Snyder*, 60 Or. 297, 118 Pac. 280; *Cote v. Christy*, 10 Pa. Super. Ct. 318; *Jones v. Reynolds*, 45 Wash. 371, 88 Pac. 577.

<sup>183</sup> *Veasey v. Doton*, 3 Allen (Mass.) 380.

to form a correct judgment. Or the situation or character of the property may be such that it cannot be inspected by him. If, for any of these reasons, he is unable to determine its value for himself, and the seller, being aware of the true value and being also aware that the purchaser is ignorant of it, takes advantage of this ignorance and misstates the value, it is no longer to be treated as a mere expression of opinion, but as a representation of fact such as will justify the rescission of the contract.<sup>184</sup> These principles are very well covered by a provision of the Civil Code of Louisiana, which, though mostly declaratory of the common law, expresses the proper rule with great clearness and precision. It is there said: "A false assertion as to the value of that which is the object of the contract is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he who is induced to contract by means of the assertion might, with ordinary attention, have detected the falsehood; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other. But a false assertion of the value or cost or quality of the object will constitute such artifice if the object be one that requires particular skill or habit, or any difficult or inconvenient operation, to discover the truth or falsity of the assertion. Sales of articles falsely asserted to be composed of precious metals, sales of merchandise by a false invoice, of any article by a false sample, of goods in packages or bales, which cannot without inconvenience be unpacked or inspected, or where

<sup>184</sup> *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018; *Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366; *Wenegar v. Bollenbach*, 180 Ill. 222, 54 N. E. 192; *Howell v. Wyatt*, 168 Ill. App. 651; *Murray v. Tolman*, 162 Ill. 417, 44 N. E. 748; *Stauffer v. Hulwick*, 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 951; *Boltz v. O'Conner*, 45 Ind. App. 178, 90 N. E. 496; *Mattauch v. Walsh*, 136 Iowa, 225, 113 N. W. 818; *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422; *Thompson v. Randall*, 28 Ky. Law Rep. 716, 90 S. W. 251; *Pinch v. Hotaling*, 142 Mich. 521, 106 N. W. 69; *Nowlin v. Snow*, 40 Mich. 699; *Face v. Hall*, 177 Mich. 495, 143 N. W. 622; *Champion Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050; *Howard v. Duncan*, 94 Neb. 685, 144 N. W. 169; *Dolan v. Cummings*, 193 N. Y. 638, 86 N. E. 1123; *Boelk v. Nolan*, 56 Or. 229, 107 Pac. 689; *Sarver v. Sarver*, 230 Pa. 60, 79 Atl. 164.

the party making the sale avoids the inspection, with intent to deceive, sales of goods at sea or at a distance, are, with others of a like nature, referable to this rule."<sup>185</sup>

**§ 82. Same; One Party Possessing Exclusive or Superior Knowledge.**—If one of the parties to a sale or other contract is in possession of exclusive knowledge in regard to the value of the subject-matter, or if his knowledge on the point is greatly superior to any information possessed by the other party, it is his duty to state the exact truth in regard to the question of value, if he makes any statement at all; and his assertion on this point is not to be treated as an expression of opinion, but as a positive representation of fact.<sup>186</sup> For instance, where the buyer and seller of corporate stock stand on an equality with respect to the means of forming a correct estimate of its value, the buyer is supposed to rely on his own judgment and cannot ordinarily hold the seller responsible for an incorrect statement as to its value. But where the seller is not only a stockholder of the corporation but also a director, and intimately acquainted with its affairs, and therefore in a position to know exactly what the stock is worth, while the buyer is simply a member of the general public and not in possession of any inside information, then representations as to the value of the stock made by the seller are not statements of his opinion, but assertions in regard to a fact of which he knows the truth, and are fraudulent if false.<sup>187</sup> Again, the seller may have acquired special and peculiar knowledge of the value of the object by having handled it or dealt in it, or because it is his business to buy and sell similar articles, and in this case also representations as to its value are to be regarded as statements of fact, and will warrant rescission

<sup>185</sup> Rev. Civ. Code La. § 1847.

<sup>186</sup> *Stephens v. Ozbourn*, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957; *Stevens v. Ozburn*, 1 Tenn. Ch. App. 213; *Judy v. Jester*, 53 Ind. App. 74, 100 N. E. 15; *Riggins v. Trickey*, 46 Tex. Civ. App. 569, 102 S. W. 918; *D. S. Giles & Son v. Horner*, 97 Neb. 162, 149 N. W. 333.

<sup>187</sup> *Shelton v. Healy*, 74 Conn. 265, 50 Atl. 742; *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453; *Auman v. McKibben*, 179 Ill. App. 425; *Jarratt v. Langston*, 99 Ark. 438, 138 S. W. 1003. But see *Commonwealth v. Mechanics' Mut. Fire Ins. Co.*, 120 Mass. 495.

if false and made with a fraudulent intention.<sup>188</sup> And we conceive that the same rule should be applied (though direct authorities on the point are not easy to find) where it is impossible to form a correct judgment of the value of the object without special training, scientific education, or acquired skill, and one of the parties possesses these qualifications while the other does not,—in short, where one of the parties is an expert and the other is not. Sales of precious stones, jewelry, works of art, complicated pieces of machinery, and other such objects, will readily suggest themselves as examples. Again, where the article in question has been thoroughly tested in practical use and found to be worthless, as the seller knows, his representation that it has great value is a fraudulent misrepresentation as to a material fact.<sup>189</sup> And so an action may be maintained against the payee of a promissory note for oral false representations, made at the time of selling it, that it has not been paid.<sup>190</sup>

§ 83. **Same; Facts Stated as Basis for Estimate of Value.**—If the seller of any property, in addition to stating that it has a certain value, undertakes to state facts on which his estimate of value is based, or facts which he wishes to impress on the purchaser as demonstrating that the property is really worth what he says it is, the assertion as to value may be a matter of opinion, but the seller is responsible for the truth of the facts, and his statement of them is a direct representation, which, if false and fraudulent, will avoid the contract.<sup>191</sup> Within the meaning of this rule, when the subject of sale is real property, one important means of esti-

<sup>188</sup> *McKibbin v. Day*, 71 Neb. 280, 98 N. W. 845.

<sup>189</sup> *Champion Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050.

<sup>190</sup> *Sibley v. Hulbert*, 15 Gray (Mass.) 509.

<sup>191</sup> *Dobell v. Stevens*, 3 Barn. & C. 623; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Fuller v. Wilson*, 3 Q. B. 58; *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655; *McAlister v. Barry*, 3 N. C. 290, Fed. Cas. No. 8,656; *Douglass v. Treat*, 246 Ill. 593, 92 N. E. 976; *Van Epps v. Harrison*, 5 Hill (N. Y.) 63, 40 Am. Dec. 314; *Hubbell v. Melgs*, 50 N. Y. 480; *Jankowsky v. Slade*, 60 Wash. 591, 111 Pac. 773; *Jones v. Hathaway*, 77 Ind. 14; *Vell v. Thompson* (Sup.) 150 N. Y. Supp. 659; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65; *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172.



mating its value is to take into consideration the amount for which it is rented or can be rented; and if the seller falsely represents to the buyer that the property is under lease, or that all the buildings or all the apartments are rented, or if he falsely states or exaggerates the amount of monthly or annual rent payable by the tenant or by any of the tenants, it is a material misrepresentation which will justify the rescission of the contract.<sup>192</sup> And this is also true of a false assertion by the vendor that he has a tenant who will lease the property and pay a named rental for it.<sup>193</sup> For the same reason, when the subject of sale is a business, a manufacturing plant, a street railway, a stock of goods, or the like, it is a fraudulent misrepresentation to assert that the business has been conducted at a profit, when in fact it has been a source of loss,<sup>194</sup> or even to conceal the fact that it has been run at a loss, when an assertion as to its value is made which impliedly represents it as profitable.<sup>195</sup> In all such cases, a false statement as to the past earnings of the business, property, or plant, made to influence the other party, is a material misrepresentation,<sup>196</sup> and so is an untrue statement regarding the volume of business done, quantity

<sup>192</sup> *Boynton v. Hazelboom*, 14 Allen (Mass.) 107, 92 Am. Dec. 738; *Lennon v. Stiles* (Sup.) 4 N. Y. Supp. 487; *Hostetter v. Daly*, 25 Pittsb. Leg. J. (N. S.) 223; *Jacoby v. Hollada*, 78 Wash. 88, 138 Pac. 558; *Morley v. Harrah*, 167 Mo. 74, 66 S. W. 942; *Circle v. Potter*, 83 Kan. 363, 111 Pac. 479; *Lee v. Tarplin*, 183 Mass. 52, 66 N. E. 431; *Edwards v. Noel*, 88 Mo. App. 434; *Saunders v. Hatterman*, 24 N. C. 32, 37 Am. Dec. 404; *Hecht v. Metzler*, 14 Utah, 408, 48 Pac. 37, 60 Am. St. Rep. 906. Under the rule that a representation as to the rentals derived from real estate is material, and, if false, affords an action for damages, a representation by the vendor that the premises are leased as apartments and that no free rents are given, when in fact the leases give the tenants one month out of twelve free of rent, is a material misrepresentation. *Kreshover v. Berger*, 135 App. Div. 27, 119 N. Y. Supp. 737. And see, further, *Thaler v. Niedermeyer*, 185 Mo. App. 257, 170 S. W. 378; *Holmes v. Coalson* (Tex. Civ. App.) 178 S. W. 628; *Jacoby v. Hollada*, 78 Wash. 88, 138 Pac. 558.

<sup>193</sup> *Sels v. Plaisantin*, 52 App. Div. 206, 65 N. Y. Supp. 70.

<sup>194</sup> *Moyes v. Schendorf*, 142 Ill. App. 293, affirmed, 238 Ill. 232, 87 N. E. 401.

<sup>195</sup> *Face v. Hall*, 177 Mich. 495, 143 N. W. 622.

<sup>196</sup> *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794; *Guilfoyle v. Pierce*, 196 N. Y. 499, 89 N. E. 1101.



of goods sold, average daily sales, or profits thereon,<sup>197</sup> or as to the daily or weekly receipts of a business,<sup>198</sup> or the annual net profits.<sup>199</sup> On a parity of reasoning it would appear that statements in regard to the costs or expenses of conducting a given business were equally material and equally fraudulent if false. And so, no doubt, it would be held in general. There is, however, a decision by an intermediate court in New York, in a case where the property sold was an apartment house, to the effect that a representation by the vendor that the janitor was receiving less pay than in fact he was, and that the tenants were paying for the gas in the halls, which was incorrect, was not material on the question of fraud.<sup>200</sup> But a misstatement that the incumbrances on the property would not exceed a certain sum is clearly material and fraudulent,<sup>201</sup> and so is a false assertion that the interest on a mortgage on the premises has been paid up to a certain date.<sup>202</sup>

For substantially the same reasons, a statement, made to induce the purchase of property, that the seller has been offered a certain price for it, is not a mere expression of opinion as to its value, but is an averment of a material fact, the falsity of which will give valid ground for rescinding

<sup>197</sup> *Jackson v. Foley*, 53 App. Div. 97, 65 N. Y. Supp. 920; *Hewey v. Fouts*, 91 Kan. 680, 139 Pac. 407; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853; *Duffy v. Blake*, 80 Wash. 643, 141 Pac. 1149. But payment for the stock and fixtures of a store cannot be resisted by reason of alleged false representations as to the amount of business done, where it appears that the purchaser did not buy the business or good will, but merely the stock and fixtures, and that the book containing a record of plaintiff's sales for several years preceding the sale was exhibited to the purchaser, and that he could easily have made a calculation from it to test the accuracy of the seller's statements. *Griffith v. Herr*, 17 Pa. Super. Ct. 601.

<sup>198</sup> *Commonwealth v. Brown*, 167 Mass. 144, 45 N. E. 1; *O'Donnell & Duer Bavarian Brewing Co. v. Farrar*, 163 Ill. 471, 45 N. E. 283. But compare *Remmers v. Berbling*, 66 Misc. Rep. 291, 123 N. Y. Supp. 41.

<sup>199</sup> *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Harding v. Taylor*, 37 Misc. Rep. 684, 76 N. Y. Supp. 365; *Graves v. Kennedy*, 119 Mich. 621, 78 N. W. 667.

<sup>200</sup> *Kranz v. Lewis*, 115 App. Div. 106, 100 N. Y. Supp. 674.

<sup>201</sup> *Severson v. Kock*, 159 Iowa, 343, 140 N. W. 220; *Crawford v. Armacost*, 85 Wash. 622, 149 Pac. 31.

<sup>202</sup> *Steip v. Segune*, 66 N. J. Law, 370, 49 Atl. 715.

the sale,<sup>203</sup> and so is a statement that a buyer can be procured immediately for the property, or for a designated part of it, at a certain price.<sup>204</sup> And a representation that an option to purchase property at a specified price has been obtained, when in fact a rebate from such price is to be made, constitutes a fraud and deceit where it induces others to join in the purchase of such property.<sup>205</sup> But it is said that a prospective purchaser, who is informed by an agent of the owner that the land is held for sale at a specified price, is bound to assume that the statement is a mere opinion of value for selling purposes, and is not justified in relying on it.<sup>206</sup> So again, statements by the seller of a patent or of rights under it, that the patented article has been largely sold, or that given numbers or quantities of it have been sold, or that he has sold local rights for stated sums, or that there is a large and constant demand for the article, and that the sales are profitable, are all material statements of fact such as will justify a rescission of the sale if false.<sup>207</sup> And in general, in regard to any commodity, a representation that it has a certain market price at which it is readily salable, is not an expression of opinion but the assertion of a fact.<sup>208</sup> So a positive but false statement by a purchaser from a dealer in goods engaged in business, that a rival dealer has offered to sell the same goods for less money, is a fraud which will justify a rescission of the contract.<sup>209</sup> But it is said that a statement in regard to the value of book accounts, referring to their collectibility or the sum which

<sup>203</sup> *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. But compare *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086. See *Hull v. Doheny*, 161 Wis. 27, 152 N. W. 417.

<sup>204</sup> *Bry Block Mercantile Co. v. Columbia Portrait Co.*, 219 Fed. 710, 135 C. C. A. 382; *Hoerling v. Lowry*, 58 Wash. 426, 108 Pac. 1090; *Hinchey v. Starrett*, 91 Kan. 181, 137 Pac. 81. But see *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409.

<sup>205</sup> *Vennum v. Palmer*, 123 Ill. App. 619.

<sup>206</sup> *Bosley v. Monahan*, 137 Iowa, 650, 112 N. W. 1102.

<sup>207</sup> *Somers v. Richards*, 46 Vt. 170; *Crosland v. Hall*, 33 N. J. Eq. 111; *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Potter v. Potter*, 65 Ill. App. 74; *Crooker v. White*, 162 Ala. 476, 50 South. 227.

<sup>208</sup> *Stoll v. Wellborn* (N. J. Ch.) 56 Atl. 894; *American Hardwood Lumber Co. v. Dent*, 121 Mo. App. 108, 98 S. W. 814.

<sup>209</sup> *Smith, Kline & French Co. v. Smith*, 166 Pa. 563, 31 Atl. 343.

can probably be realized from them, is necessarily nothing more than an opinion.<sup>210</sup>

As applied to the purchase and sale of mining property, it may be stated as a rule that the seller's assertion that the property is worth a certain price is only an expression of his opinion, but that if he states facts intended to impress the purchaser, and on which he expects the latter to base his own estimate of the value,—as, that the property contains a silver mine, that it abounds in valuable minerals, that tests made by drilling have demonstrated the existence of minerals, that a certain body of ore has been blocked out, that assays show a certain value per ton, that the mine is producing at the rate of so many tons per day,—these are representations of fact, which will warrant rescission of the contract if false and fraudulently intended.<sup>211</sup> In an action on a promissory note given in part payment for a mine, the court on review said: "We do not think that the plaintiff was entitled to the second charge which he asked, that the sale of gold mines is peculiar, and that representations concerning them are matters of opinion only and do not amount to a warranty that they are as represented. This, we apprehend, depends entirely upon the nature of the representations. They may be so positive as to amount to a warranty, and if so, they stand upon the same footing as representations concerning any other species of property."<sup>212</sup>

**§ 84. Same; Statement of Cost or Price on Previous Sale.**—When a vendor of property represents to the purchaser that it cost him a certain sum, or, in other words, states the price which he himself paid for it on a previous sale, he does not express an opinion but asserts a fact. And it is a fact which might legitimately influence the mind of the purchaser in forming an estimate of the value of the property. And such a statement is almost invariably made for the purpose of so influencing the purchaser and could hardly be supposed to have any other motive. For these

<sup>210</sup> Taylor v. Ford, 131 Cal. 440, 63 Pac. 770.

<sup>211</sup> Hicks v. Jennings (C. C.) 4 Fed. 855; Cooper v. Maggard (Tex. Civ. App.) 79 S. W. 607; Peyton v. Butler, 3 Hayw. (Tenn.) 141; Martin v. Hill, 41 Minn. 337, 43 N. W. 337.

<sup>212</sup> Leonard v. Peeples, 30 Ga. 61.

reasons many courts have held that a statement of this kind is a representation of a material fact, such that, if it is false and is intended to lead the purchaser into an agreement for the sale, it will afford him ground for rescission of the contract or for relief against it in equity.<sup>213</sup> Thus, a statement by an owner of corporate stock that he paid par for it, made to induce another to take it in exchange for land, is held to be a representation as to a material existing fact, and not an opinion as to value, so as to constitute actionable fraud, if false.<sup>214</sup> And a vendor of goods who knows that the price marks thereon do not correctly show the actual cost, but falsely and fraudulently and with intent to deceive represents to the purchaser that they do so correctly show the cost, is liable to the latter who buys in reliance on the statement and is deceived to his injury.<sup>215</sup> So representations by one holding an option for the purchase of land, to one purchasing a portion of it from him, that the price charged is the same as that paid by the vendor, if false, constitute ground for an action of deceit.<sup>216</sup> And an even stronger case is made out where the seller exhibits a bogus check for a large amount as showing the price he paid for the property.<sup>217</sup> So it is ruled that a false denial that bonds had sold as low as ten per cent of their par value is an actionable misrepresentation.<sup>218</sup>

Yet it must be admitted that these views are not universally accepted. Some very respectable authorities hold that the seller's false statement as to what he paid for the property is not such a misrepresentation as will avoid the sale.<sup>219</sup>

<sup>213</sup> *Mason v. R. M. Thornton & Co.*, 74 Ark. 46, 84 S. W. 1048; *Underwood v. Caldwell*, 102 Ga. 16, 29 S. E. 164; *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074 (reversing 96 Ill. App. 17); *Warren v. Miller* (Iowa) 99 N. W. 127; *Long v. Duncan*, 14 Ky. Law Rep. 812; *McLain v. Parker*, 229 Mo. 68, 129 S. W. 500; *Stewart v. Salisbury Realty & Ins. Co.*, 159 N. C. 230, 74 S. E. 736; *National Bank of Anadarko v. Oldham*, 26 Okl. 139, 109 Pac. 75; *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186.

<sup>214</sup> *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777.

<sup>215</sup> *Mason v. R. M. Thornton & Co.*, 74 Ark. 46, 84 S. W. 1048.

<sup>216</sup> *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40.

<sup>217</sup> *Springhetti v. Hahnwald*, 54 Colo. 383, 131 Pac. 266.

<sup>218</sup> *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498.

<sup>219</sup> *Mackenzie v. Seeberger*, 76 Fed. 108, 22 C. C. A. 83; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Medbury*

The decisions so holding are based on the theory that such a misstatement is to be regarded merely as "puffing" or "dealers' talk," on which a purchaser has no right to place any reliance, that he should be on his guard against exaggerations of this sort, and that if he concludes the contract merely on the strength of information so given to him, he should attribute his resulting loss to his own unwisdom.

**§ 85. Puffing, Exaggerated Praise, "Dealers' Talk."**—It was the ancient policy of the law (unhappily not quite extinct even yet) to permit the seller of any property to go as far as he chose in the way of telling falsehoods about the worth or value of his property. Mendacity in this respect has been regarded by the courts as a matter of usual and natural occurrence and therefore not to be visited with the penalties of the law. While viewing the conduct of the untruthful vendor with indulgent tolerance, they have animadverted severely upon the folly of a purchaser who allows himself to be thus deluded. Accordingly, there are many decisions, both early and late, that a contract of sale is not to be rescinded or relieved against merely because the purchaser was led to pay an excessive price by the seller's practice of the art of "puffing," or by what is called "dealers' talk," that is, boasting, bragging, extravagant praise of the thing sold, or exaggerated statements of its worth or value.<sup>220</sup> In an early case, it was even held that

*v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Belcher v. Costello*, 122 Mass. 189; *Sowers v. Parker*, 59 Kan. 12, 51 Pac. 888; *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377, 51 S. W. 736; *Beare v. Wright*, 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409, 8 Ann. Cas. 1057; *Harvey v. Knapp*, 194 Pa. 219, 45 Atl. 74.

<sup>220</sup> *Mackenzle v. Seeberger*, 76 Fed. 108, 22 C. C. A. 83; *Patten v. Glatz* (C. C.) 87 Fed. 283; *Tillis v. Smith Sons Lumber Co.*, 188 Ala. 122, 65 South. 1015; *Terhune v. Coker*, 107 Ga. 352, 33 S. E. 394; *Tuck v. Downing*, 76 Ill. 71; *Zempel v. Hughes*, 235 Ill. 424, 85 N. E. 641; *Bear v. Fletcher*, 252 Ill. 206, 96 N. E. 997; *Standish v. Nicolls*, 162 Ill. App. 131; *Drosdoff v. Fetzner*, 178 Ill. App. 336; *Burwash v. Ballou*, 132 Ill. App. 71; *Woods v. Nicholas*, 92 Kan. 258, 140 Pac. 862; *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *State v. Marlon*, 235 Mo. 359, 138 S. W. 491; *Harrison v. Walden*, 89 Mo. App. 164; *Black v. Epstein*, 93 Mo. App. 459, 67 S. W. 736; *Frey v. Middle Creek Lumber Co.*, 144 N. C. 759, 57 S. E. 464; *Vaughan v.*

to praise land offered at public sale as valuable for the gold which it contains, when it actually contains none, is not a fraudulent misrepresentation.<sup>221</sup>

But this is one of the fields in which the standards of the law are rapidly overtaking the standards of ethics, and the gap between "moral honesty" and "law honesty" is beginning to close. It has recently been stated by a court of high authority that it is not now the policy of the law to extend for the benefit of sellers the limits of immunity for false statements under the guise of trade talk.<sup>222</sup> And the modern doctrine strictly limits the privilege of making false asseverations to the single point of value. The right of a seller to praise his property, it is now said, does not justify the making of any false representations as to material facts concerning it which are calculated to deceive, made with that intention, and relied on by the purchaser.<sup>223</sup> And even on the question of price, it has been ruled that assurances of value seriously made and intended to be accepted, and reasonably relied on as statements of fact inducing a contract, may be considered in determining whether the contract was brought about by fraud.<sup>224</sup> Again, the liberty of the vendor is further circumscribed by the rule that his statements must relate to some element of value about which the purchaser can inform himself, or which is open to his inspection. Thus, if a vendor of land makes a misrepresentation in regard to some property or quality of the land which is not patent to observation or discoverable by mere inspection, it is a good defense to an action for specific performance, even though it was made in ignorance of the truth, and though the vendee agreed to take the risk. "Undoubtedly a vendor may praise, to the most extravagant ex-

Exum, 161 N. C. 492, 77 S. E. 679; Oltman v. Williams, 167 N. C. 312, 83 S. E. 348, Ann. Cas. 1916A, 587; Black v. Irvin (Or.) 149 Pac. 540.

<sup>221</sup> McDowell v. Simms, 41 N. C. 278.

<sup>222</sup> Noyes v. Meharry, 213 Mass. 598, 100 N. E. 1090.

<sup>223</sup> Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; Wegner v. Herkimer, 167 Mich. 587, 133 N. W. 623; Pratt v. Allegan Circuit Judge, 177 Mich. 558, 143 N. W. 890; Stumpf v. Sargent, 21 Misc. Rep. 674, 47 N. Y. Supp. 1086.

<sup>224</sup> Unitype Co. v. Ashcraft Bros., 155 N. C. 63, 71 S. E. 61.

tent, qualities which are susceptible of inspection, but a misrepresentation of an occult quality, in regard to which the vendee is not supposed to buy on his own judgment, would be followed by very decisive consequences."<sup>225</sup> Finally, it is not to be forgotten that one purchaser may be so ignorant of the value of the article in question, or naturally so credulous, that he will be easily deceived by exaggerations and boasts which would make no impression upon another. And the law is now coming to recognize the truth that these mental inequalities in men should always be taken into account, and that its protection is to be extended to the foolish and the confiding, no less than to the shrewd and alert.<sup>226</sup> In a recent case in Kentucky, it was ruled that sufficient ground for the rescission of a contract to purchase certain commodities could not be found in the fact that they did not come up to the extravagant commendations made by the seller's salesman. But at the same time it appeared that the buyer was an experienced merchant, entirely familiar with the custom of salesmen of indulging in exaggerated praise in their efforts to sell goods.<sup>227</sup> And it is a just and easy inference that this decision would have turned the other way if it had been shown that the purchaser was uninformed, unaccustomed to business methods, or easily imposed upon and deceived.

**§ 86. Statements as to Future Value, Profit, or Efficiency.**—In order to effect a sale, induce the making of a contract, or place a proposed investment in a favorable light, it is quite common to make representations as to future value, productiveness, efficiency, or economy, or as to expected earnings or profits. But since that which lies in the future cannot be a matter of certain knowledge, it is held that all such representations must be taken and understood as mere expressions of opinion, and therefore their non-fulfillment cannot be treated as a fraud.<sup>228</sup> Representations

<sup>225</sup> *Fisher v. Worrall*, 5 Watts & S. (Pa.) 478.

<sup>226</sup> See, *infra*, § 125.

<sup>227</sup> *Crawford & Gatlin v. M. Livingston & Co.*, 153 Ky. 58, 154 S. W. 407, 44 L. R. A. (N. S.) 640.

<sup>228</sup> *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22; *Ryan v. Middlesborough Town Lands Co.*, 106 Ky. 181, 52 S. W. 33;



which are mere guesswork, it is said, are not a proper basis for a charge of fraud,<sup>229</sup> and statements of forecast, opinion, or expectation, which are in substance mere matters of inference, cannot be considered false representations justifying the rescission of a contract.<sup>230</sup>

This rule is frequently applied to statements made to persons to induce them to subscribe for stock in a corporation or to purchase the shares of an existing company. All assertions in regard to the future earnings of the company or the successful conduct of its business, in regard to the dividends it will pay or the profits to be derived from it, or in regard to an expected or predicted increase in the market value of the stock, are merely matters of opinion, on which the subscriber or purchaser has no right to rely, and though they are not verified by the course of events, or prove to have been false when made, or even to have been made with no expectation of their ever being realized, still they furnish no ground for rescinding the contract.<sup>231</sup> And on the same principle, statements by the officers of a building association as to how soon the shares of stock will

*Grone v. Economic Life Ins. Co.* (Del. Ch.) 80 Atl. 809; *Sleeking v. Litzler*, 31 Ind. 13. Compare *American Cotton Co. v. Collier*, 30 Tex. Civ. App. 105, 69 S. W. 1021. And see, generally, the cases cited below in this section.

<sup>229</sup> *Florida Cigar & Tobacco Co. v. Baker & Holmes Co.*, 62 Fla. 487, 57 South. 174.

<sup>230</sup> *Greene v. Société Anonyme des Matières Colorantes* (C. C.) 81 Fed. 64.

<sup>231</sup> *Crosby v. Emerson*, 142 Fed. 713, 74 C. C. A. 45; *Johnson v. National B. & L. Ass'n*, 125 Ala. 465, 28 South. 2, 82 Am. St. Rep. 257; *Jefferson v. Hewitt*, 95 Cal. 535, 30 Pac. 772; *Wegerer v. Jordan*, 10 Cal. App. 362, 101 Pac. 1066; *Weston v. Columbus Southern Ry. Co.*, 90 Ga. 289, 15 S. E. 773; *Brownlee v. Ohio, Ind. & Ill. R. Co.*, 18 Ind. 68; *Swan v. Mathre*, 103 Iowa, 261, 72 N. W. 522; *Gamet v. Haas*, 165 Iowa, 565, 146 N. W. 465; *First Nat. Bank v. Fulton*, 156 Iowa, 734, 137 N. W. 1019; *Vokes v. Eaton*, 119 Ky. 913, 85 S. W. 174; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *Smith v. Corbin*, 135 Ky. 727, 123 S. W. 277; *Hughes v. Antietam Mfg. Co.*, 34 Md. 316; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623; *Scott v. Brusse*, 148 Mich. 529, 112 N. W. 117; *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889; *Pritchard v. Dailey*, 168 N. C. 330, 84 S. E. 392; *Coil v. Pittsburgh Female College*, 40 Pa. 439; *Lane v. Southern B. & L. Ass'n* (Tenn. Ch. App.) 54 S. W. 329; *Romaine v. Excelsior Carbide & Gas Mach. Co.*, 54 Wash. 41, 103 Pac. 32; *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890.



mature or attain their full value, and how low the rate of interest will be to the borrower, are merely matters of opinion and not fraudulent representations.<sup>282</sup>

So also, where the subject of the contract is an investment in a business enterprise, or the purchase and sale of a business or of an interest in it, statements in regard to the amount of business to be done or of the profits derivable from it are no more than predictions or opinions as to future events, and however extravagant or illusory they may be, they do not constitute ground for rescinding the agreement.<sup>283</sup> For instance, representations as to the value of an invention, and as to what can be done with it in the future, are not sufficient to support an allegation of fraud.<sup>284</sup> So a statement by the seller of an interest in property to be transferred to a fishing company, concerning the number of pounds of fish that could be taken by the company in the course of a season, is not a representation, but merely an expression of opinion, on which the purchaser has no right to rely.<sup>285</sup> So, in a case in the federal courts, the project in which the plaintiff had been induced to invest, and from which he sought to be released, was the building of a commercial harbor and a summer resort on the New Jersey coast. It was said: "A certain amount of confidence in the future, even if it turns out to be ill-founded, is to be expected in the promoters of any scheme that is honestly conceived and honestly carried on; and the expression of such confidence is not unlawful, even if it employ superlatives and indulge somewhat in rhetorical phrases. Custom allows a

<sup>282</sup> *Myers v. Alpena Loan & Bldg. Ass'n*, 117 Mich. 389, 75 N. W. 944; *Hunter v. International B. & L. Ass'n*, 24 Tex. Civ. App. 453, 59 S. W. 596. But see *Loucks v. Taylor*, 23 Ind. App. 245, 55 N. E. 238.

<sup>283</sup> *Buresh v. Seymour*, 187 Ill. App. 295; *O'Donnell & Duer Bavarian Brewing Co. v. Farrar*, 163 Ill. 471, 45 N. E. 283; *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053; *Stewart v. Puck Soap Co.*, 154 Iowa, 411, 135 N. W. 70; *Central Life Assur. Soc. v. Mulford*, 45 Colo. 240, 100 Pac. 423; *Macklem v. Fales*, 130 Mich. 66, 89 N. W. 581; *Truman v. J. I. Case Threshing Mach. Co.*, 169 Mich. 153, 135 N. W. 89. See *Beck v. Goar*, 180 Ind. 81, 100 N. E. 1; *Meritas Realty Co. v. Farley*, 166 App. Div. 420, 151 N. Y. Supp. 1052.

<sup>284</sup> *Patent Title Co. v. Stratton (C. C.)* 89 Fed. 175.

<sup>285</sup> *Hansen v. Baltimore Packing & Cold Storage Co. (C. C.)* 86 Fed. 832.

seller to praise his wares, if he does not deceive or take an unfair advantage of his better knowledge, and this is true also where the future course of events is the subject in question, and where the things that may happen must be more or less conjectural. We regard the scheme now under consideration as an enterprise obviously speculative, but honestly conceived and honestly prosecuted, and we do not think it discloses any intention to deceive or mislead."<sup>286</sup> But while predictions are not representations of fact, it must be remembered that if they are professedly based on existing facts, those facts must be truthfully stated, to avoid the charge of fraud. Thus, the sellers of certain tailing mills, with the right to mill dumps and deposits supposed to contain ore, represented as true of their own knowledge that there were sufficient dumps and tailings on the premises rich in ore to operate the mills at a stated monthly profit for a period of at least seven years. Now, although this involved a prediction, it was based on present and ascertainable facts; and accordingly it was held that the falsity of such representations constituted a good defense to an action for the price of the mills.<sup>287</sup> And a similar ruling was made in a case in which the defendant had represented that he had discovered a secret formula for making varnish from rubber which would be superior to anything on the market, but it proved that he was entirely unable to make a commercially useful or salable article.<sup>288</sup>

In general, expressions of opinion in regard to the utility or serviceability of an article sold are not representations of fact, and consequently not fraudulent though false.<sup>289</sup> Thus, statements by a wholesaler selling whisky to a retail liquor dealer, that the whisky will meet the wants of the purchaser's trade, are expressions of opinion and not mis-

<sup>286</sup> *Mamaux v. Cape May Real Estate Co.*, 214 Fed. 757, 131 C. C. A. 63.

<sup>287</sup> *Evans v. Palmer*, 137 Iowa, 425, 114 N. W. 912.

<sup>288</sup> *Finley Rubber Varnish & Enamel Co. v. Finley* (N. J. Ch.) 32 Atl. 740.

<sup>289</sup> *Estep v. Larsh*, 21 Ind. 190; *Woodridge v. Brown*, 149 N. C. 299, 62 S. E. 1076. But a representation that a worthless medicine is a sure cure for cholera is a misrepresentation of fact and actionable. *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

representations of fact.<sup>240</sup> But where an article is sold with knowledge that it is intended to be used for a particular purpose, a representation that it is fit and suitable for that special purpose is not an expression of opinion as to the future, but a representation of an existing fact.<sup>241</sup> Where the property sold is farming land, it is generally held that representations as to its suitability for agriculture, as to the kind of crops it is adapted for, or as to the volume or value of the crops to be raised on it, are only predictions or expressions of opinion, and hence not ground for rescinding the sale, though they prove to be incorrect.<sup>242</sup> As illustrating the length to which extravagant praise may go without being branded as fraudulent, we may cite a case in which the seller of lands in Texas issued a prospectus or pamphlet to prospective purchasers to induce them to buy. This pamphlet described the lands in question as richer than the valleys of Southern California, and as a land of "fruit and flowers and happy homes," which would treble and quadruple in value within two years, and referred by analogy in describing it to the Garden of Eden, Monte Cristo, and Aladdin's lamp, and also stated that the land could not be kept from becoming a land of gold, and that all eyes were turned on Southwest Texas, because the natural resources were there, and the tide of immigration would turn that way, and it was a full tide, and that independence was to be had there for the asking. But all this was held to be a mere expression of opinion, and therefore not sufficient to support an action for deceit.<sup>243</sup> On the other hand, a false representation by a vendor of land that a creek, bordering the land sold, had no tendency to overflow its banks, was held to be actionable.<sup>244</sup>

<sup>240</sup> *Shiretzki v. Kessler*, 147 Ala. 678, 37 South. 422.

<sup>241</sup> *King v. Baker*, 1 Yerg. (Tenn.) 450; *Jones v. Grieve*, 15 Cal. App. 561, 115 Pac. 333.

<sup>242</sup> *Saxby v. Southern Land Co.*, 109 Va. 196, 63 S. E. 423; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Ware v. Dunlap*, 159 Mo. App. 388, 141 S. W. 21. But compare *Stonemets v. Head*, 248 Mo. 243, 154 S. W. 108; *Buckingham v. Thompson* (Tex. Civ. App.) 135 S. W. 652.

<sup>243</sup> *Buckingham v. Thompson* (Tex. Civ. App.) 135 S. W. 652.

<sup>244</sup> *Oakes v. Miller*, 11 Colo. App. 374, 55 Pac. 193.

Mines and mining properties are proverbially speculative, and it is well known that they must be, and are, extravagantly praised and supported by a convincing array of alleged facts, to induce the public to invest in them. Here a purchaser or investor should be peculiarly on his guard to observe the distinction between representations of existing facts, on which he may justifiably rely, and expressions of opinion, on which he may not. Predictions as to the value of a mine, or as to the volume or value of its output, are necessarily opinions, which can only be verified by the course of events. If there is no fraudulent concealment or misrepresentation of existing conditions, and the purchaser places confidence in such promissory statements, he does so at his own risk and cannot withdraw because he is disappointed.<sup>245</sup> In one of the cases it was said: "It is in proof that, in buying and selling mines, people buy and pay or agree to pay for them, influenced by the prospect. No man, however scientific he may be, could certainly state how a mine, with a most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. The 'sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character."<sup>246</sup>

In accordance with the general rule regarding statements as to future results, it is generally held that representations made by sellers of machinery as to what the machinery will do in the future, or that it will accomplish certain results, are merely expressions of opinion, and therefore not sufficient to support a charge of fraud.<sup>247</sup> Thus, representations

<sup>245</sup> *Tuck v. Downing*, 76 Ill. 71; *Watts v. Cummins*, 59 Pa. 84.

<sup>246</sup> *Tuck v. Downing*, 76 Ill. 71, 94.

<sup>247</sup> *Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250; *American Soda Fountain Co. v. Spring Water Carbonating Co.*, 207 Mass. 488, 93 N. E. 801. But compare *Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477; *J. I. Case Threshing Mach. Co. v. Feezer*, 152

by the seller of a cash register that it will save the expense of a bookkeeper, and that by means of it books can be kept in half the time that would otherwise be required, and that the machine can be operated by any person of ordinary intelligence, are not representations of material facts and, though false, are not grounds for rescission by the purchaser.<sup>248</sup> The same rule has been applied to a representation that an engine was of sufficient power to drive a particular machine for which it was purchased,<sup>249</sup> and to a statement that a boiler sold to defendant would give greater capacity, steam pressure, power, and economy than the old boiler owned by defendant, and would prove more satisfactory.<sup>250</sup>

**§ 87. Representations as to Validity and Scope of Patents.**—Representations made by one selling a patent for an invention or rights or licenses under it, to the effect that it is valid and that it does not conflict or interfere with certain specified existing patents, or generally that it does not interfere with any prior patent, are to be treated as expressions of opinion, and not as statements of fact on which a suit for rescission could be based, unless it appears that there was a prior patent covering the identical invention and that the seller was aware of it.<sup>251</sup> For the same reason, a charge of fraudulent misrepresentations cannot be based on statements concerning the scope of a patent, or as to what arts, methods, or processes it covers, or what exclusive rights are granted by it.<sup>252</sup> And statements and rep-

N. C. 516, 67 S. E. 1004; *American Cotton Co. v. Collier*, 30 Tex. Civ. App. 105, 69 S. W. 1021; *Geo. O. Richardson Mach. Co. v. Nelson*, 191 Mo. App. 230, 177 S. W. 1082.

<sup>248</sup> *National Cash Register Co. v. Townsend Grocery Store*, 137 N. C. 652, 50 S. E. 306, 70 L. R. A. 349.

<sup>249</sup> *Gaar v. Halverson*, 128 Iowa, 603, 105 N. W. 108. But compare *American Cotton Co. v. Heierman*, 37 Tex. Civ. App. 312, 83 S. W. 845.

<sup>250</sup> *Detroit Shipbuilding Co. v. Comstock*, 144 Mich. 516, 108 N. W. 286.

<sup>251</sup> *Reeves v. Corning (C. C.)* 51 Fed. 774; *Dillman v. Nadlehofer*, 119 Ill. 567, 7 N. E. 88. And see *Patton v. Glatz (C. C.)* 56 Fed. 367. But compare *Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 65 Pac. 373, 99 Am. St. Rep. 684.

<sup>252</sup> *Huber v. Guggenheim (C. C.)* 89 Fed. 598; *Ferry-Hallock Co. v. Progressive Paper Box Co.*, 76 N. J. Eq. 338, 75 Atl. 1100.

representations as to the value of an invention and as to what can be done with it in the future are not such as will warrant relief to the purchaser, however exaggerated or false, because these things are matters of opinion, on which he should form his own judgment.<sup>253</sup>

§ 88. **Representations as to Validity and Value of Checks, Notes, and Securities.**—The genuineness and validity of a check, note, bond, etc., are matters of fact as distinguished from matters of opinion, and to represent worthless paper as being valuable is a misstatement of fact. Hence a person who is deceived and cheated by these means may rescind his contract or obtain relief in the courts on the ground of fraudulent misrepresentations. Thus it is a fraud to offer, in payment of money due, a check on a bank where there are no funds to meet it, since a representation that it is good and will be honored may be implied from the tender of it,<sup>254</sup> and the same rule applies where the drawer of the check actually has funds in the bank sufficient to meet it at that moment, but intends to stop payment before it can be cashed, and does so,<sup>255</sup> and where he pays the purchase price of land with a pretended certificate of deposit,<sup>256</sup> and where one induces another to give him the face value of a draft drawn on a third person by false representations that the drawee has funds of the drawer in his hands and will accept and pay the draft.<sup>257</sup> So also, a contract may be rescinded where the consideration is paid in promissory notes which are represented as being "first class paper," or good for their entire face value, whereas they are worthless.<sup>258</sup> And a conveyance of land was set aside as having been procured by fraud, where the consideration given was certain notes secured by a deed of trust, which the grantor was led to believe were worth

<sup>253</sup> *Patent Title Co. v. Stratton* (C. C.) 89 Fed. 174.

<sup>254</sup> *Eastern Trust & Banking Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17.

<sup>255</sup> *Robbins v. Wyman, Partridge & Co.*, 75 Wash. 617, 135 Pac. 656.

<sup>256</sup> *Koebel v. Doyle*, 256 Ill. 610, 100 N. E. 154.

<sup>257</sup> *Van Benscoten v. Seaman*, 25 Misc. Rep. 234, 55 N. Y. Supp. 79.

<sup>258</sup> *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Wagner v. Lewis*, 38 Neb. 320, 56 N. W. 991; *Hyer v. Smith*, 48 W. Va. 550, 37 S. E. 632.

their full face value, but which the grantee knew to have been made by a fictitious or irresponsible party, on land of little value in a distant state to which the maker of the deed of trust had no title.<sup>259</sup> Such was also the decision in a case where the consideration given for land was stock in a corporation which was worthless, because of the fraudulent organization of the corporation by the person tendering the stock.<sup>260</sup> So again one may recover the money he paid for a county warrant which the defendant represented to him as being a legal and bona fide charge against the county, well knowing that the warrant was illegal and that payment of it would be enjoined, which afterwards happened.<sup>261</sup> In an interesting case in the federal courts, it appeared that a timber company had executed a mortgage to the defendant trust company, as trustee, to secure an issue of bonds, and it contained a provision that the bonds should not be valid until certified by defendant, and that, before any of the bonds should be issued, the mortgagor should deposit with defendant a sum sufficient to pay the first two years' interest. After the defendant had accepted the trust, the mortgagor pledged one hundred of the bonds to the plaintiff and gave him an order on the defendant therefor. Defendant then gave plaintiff a letter, in which it recited the receipt of the order, and that the bonds were part of a described issue on the mortgagor's property, the title to which had been examined and approved by defendant, and that the papers were then in its possession, and which said "We will hold the one hundred bonds subject to your order." It was held that defendant's promise to hold such "bonds" constituted a representation that defendant had certified the bonds and received the money, in compliance with the conditions precedent to their validity, and the fact that this representation was false was sufficient to entitle the plaintiff to recover damages suffered by reason of his having acted on the faith of it, in an action against the defendant for deceit.<sup>262</sup>

<sup>259</sup> *Rice v. Silverston*, 170 Ill. 342, 48 N. E. 969.

<sup>260</sup> *Wagner v. Fehr*, 211 Pa. 435, 60 Atl. 1043, 3 Ann. Cas. 608.

<sup>261</sup> *Parker v. Ausland*, 13 S. D. 169, 82 N. W. 402.

<sup>262</sup> *Sprigg v. Commonwealth Title Ins. & Trust Co.*, 131 Fed. 5, 65 C. C. A. 243.



§ 89. **Promises and Promissory Representations.**—It is almost universally agreed by the authorities that a false representation, in order to be of such a character as to justify the rescission of a contract or the cancellation of a conveyance, must relate to some past or present fact or state of facts, and not to that which will or may occur in the future. Hence it is a rule that failure to perform a promise made for the purpose of inducing the other party to contract, or the non-fulfillment of a promissory representation, made for the same purpose, is not such fraud as will authorize the disappointed party to repudiate the contract or warrant the courts in giving him relief by way of rescission.<sup>268</sup> Various reasons have been assigned in sup-

<sup>268</sup> *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22; *Union Pac. R. Co. v. Barnes*, 64 Fed. 80, 12 C. C. A. 48; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Conoway v. Newman Mill & Lumber Co.*, 91 Ark. 324, 121 S. W. 353; *People v. Green*, 22 Cal. App. 45, 133 Pac. 334; *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386; *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32; *Meacham v. State*, 7 Ga. App. 713, 68 S. E. 52; *Russell v. Robbins*, 247 Ill. 510, 93 N. E. 324, 139 Am. St. Rep. 342; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Koehler v. Glaum*, 169 Ill. App. 537; *Buyers' Index Pub. Co. v. American Shoe Polish Co.*, 169 Ill. App. 618; *Press v. Hair*, 133 Ill. App. 528; *McConnell v. Pierce*, 116 Ill. App. 103; *Love v. McElroy*, 118 Ill. App. 412; *Weigand v. Cannon*, 118 Ill. App. 635; *Dickinson v. Atkins*, 100 Ill. App. 401; *Stockham v. Adams*, 96 Ill. App. 152; *State v. Ferris*, 171 Ind. 562, 86 N. E. 993, 41 L. R. A. (N. S.) 173; *Vogel v. Demorest*, 97 Ind. 440; *Bennett v. McIntyre*, 121 Ind. 231, 23 N. E. 78, 6 L. R. A. 736; *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519; *Smith v. Parker*, 148 Ind. 127, 45 N. E. 770; *Kain v. Rinker*, 1 Ind. App. 86, 27 N. E. 328; *State v. Carlisle*, 21 Ind. App. 438, 52 N. E. 711; *Hartsville University v. Hamilton*, 34 Ind. 506; *Sleev-king v. Litzler*, 31 Ind. 13; *D. H. Baldwin & Co. v. Moser (Iowa)* 123 N. W. 989; *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529; *Kiser v. Richardson*, 91 Kan. 812, 139 Pac. 373, Ann. Cas. 1915D, 539; *Pine Mountain Iron & Coal Co. v. Ford*, 21 Ky. Law Rep. 142, 50 S. W. 27; *Mooney v. Miller*, 102 Mass. 217; *Pedrick v. Porter*, 5 Allen (Mass.) 324; *Bigelow v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L. R. A. (N. S.) 203; *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94; *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316; *Pile v. Bright*, 156 Mo. App. 301, 137 S. W. 1017; *Mathews v. Eby*, 149 Mo. App. 157, 129 S. W. 1016; *State v. Krouse*, 171 Mo. App. 424, 156 S. W. 727; *Esterly Harvesting Mach. Co. v. Berg*, 52 Neb. 147, 71 N. W. 952; *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. 747; *State v. Vanderbilt*, 27 N. J. Law, 328;



port of this rule. But those which are most convincing are, first, that a statement as to future action or future results or effects cannot be anything more than an expression of opinion, since the course of events at a future time is not a subject on which any definite knowledge can exist; and second, that a prediction, an assurance as to future occurrences, or even a promise, cannot possibly be untrue at the time when it is made, and therefore cannot be technically a "false" representation inducing the making of the contract.<sup>264</sup> Of course this rule does not mean that a person who is deceived and misled into the making of a disadvantageous bargain by the use of illusory representations as to future actions or events is without remedy. It only means that he cannot have the remedy of rescission on the specific ground of false and fraudulent representations. But the particular thing promised to be done in the future may have constituted more than an influence or inducement. It may have entered into the contract in such a way as to form part of the consideration for it. And in that case the refusal or neglect to perform what was promised may constitute such a failure of consideration as will warrant

*Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698; *Schneider v. Miller*, 129 App. Div. 197, 113 N. Y. Supp. 399; *Closius v. Reiners*, 13 App. Div. 163, 43 N. Y. Supp. 297; *Hackett v. Equitable Life Assur. Soc.*, 30 Misc. Rep. 523, 63 N. Y. Supp. 847; *Ball v. Gerard*, 160 App. Div. 619, 146 N. Y. Supp. 81; *Wilson v. Meyer*, 154 App. Div. 300, 138 N. Y. Supp. 1048; *Taylor v. Territory*, 2 Okl. Cr. App. 1, 99 Pac. 628; *Miller v. Fulmer*, 25 Pa. Super. Ct. 106; *Creveling's Appeal*, 3 Walk. (Pa.) 380; *Johnson v. State*, 57 Tex. Cr. App. 347, 123 S. W. 143; *Martin v. Daniel* (Tex. Civ. App.) 164 S. W. 17; *Love v. Teter*, 24 W. Va. 741; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; *Krouskop v. Krouskop*, 95 Wis. 296, 70 N. W. 475; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. Promissory representations as conditions subsequent, see, *infra*, § 213. And see further, in support of the general rule above stated, *Everist v. Drake*, 26 Colo. App. 273, 143 Pac. 811; *Creighton v. Campbell*, 27 Colo. App. 120, 149 Pac. 448; *Depugh v. Frazier*, 167 Iowa, 742, 149 N. W. 854; *Carter v. Orne*, 112 Me. 365, 92 Atl. 289; *Irwin v. Wolcott*, 183 Mich. 92, 149 N. W. 1035; *Klebold Press v. Elmore* (Sup.) 150 N. Y. Supp. 978; *Deyo v. Hudson*, 89 Misc. Rep. 525, 153 N. Y. Supp. 693; *Barnes v. Campbell* (Tex. Civ. App.) 179 S. W. 444; *Commonwealth Bonding & Casualty Ins. Co. v. Barrington* (Tex. Civ. App.) 180 S. W. 936.

<sup>264</sup> *McLaughlin v. Thomas*, 86 Conn. 252, 85 Atl. 370.

rescission or the cancellation of a conveyance.<sup>265</sup> Or the promise may enter into and form a part of the contract itself, so that the party injured by non-fulfillment may be entitled to maintain an action for damages as for breach of the contract.<sup>266</sup> Or the circumstances may be such that the promissory representation may be treated as a separate and distinct agreement, thus giving a remedy for its breach.<sup>267</sup> Or it may be that the injured party, though unable to repudiate his bargain, may recover what he has lost by means of an action for deceit, as was ruled in an English case, where a person who was a promoter and director of a corporation, and who knew that it was a worthless concern and would never earn or pay any dividends, gave a written guaranty that shareholders would receive a minimum annual dividend of thirty-three per cent, whereby the plaintiff was induced to invest his money in the stock of the company, and of course lost it.<sup>268</sup>

For these reasons, it is held that the breach of a stipulation in a contract for the sale of a business, that the seller will not again engage in the same business or will not carry on the business in the same town, is not ground for rescinding the contract, but the remedy is an action for damages for breach of the contract.<sup>269</sup> And where a promise is made to a merchant purchasing goods that he shall have the exclusive sale of that line of commodities in his town,

<sup>265</sup> *Dudley v. Herring*, 30 Ky. Law Rep. 270, 98 S. W. 289; *Russell v. Bryant*, 181 Mass. 447, 63 N. E. 927; *Edwards v. Edwards*, 104 Ark. 641, 149 S. W. 89. And see *O'Brien v. Camp*, 46 Tex. Civ. App. 12, 101 S. W. 557.

<sup>266</sup> *Piedmont Land Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, 11 South. 332; *Troxler v. New Era Building Co.*, 137 N. C. 51, 49 S. E. 58; *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; *New York Life Ins. Co. v. Miller*, 11 Tex. Civ. App. 536, 32 S. W. 550; *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823; *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65.

<sup>267</sup> *Knowlton v. Keenan*, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282.

<sup>268</sup> *Gerhard v. Bates*, 2 El. & Bl. 490.

<sup>269</sup> *Taylor v. Saurman*, 110 Pa. 3, 1 Atl. 40; *Witt v. Cuenod*, 9 New Mex. 143, 50 Pac. 328; *Hirsch v. Hirsch*, 21 Ark. 342. But compare *Dishman v. Huetter*, 41 Wash. 626, 84 Pac. 590. And see *Hale Elevator Co. v. Hale*, 201 Ill. 131, 66 N. E. 249.

or that they will not be sold to his competitors, the breach of this agreement may give him a right of action for damages, but will not justify him in rescinding the contract and returning the goods.<sup>270</sup> But it is otherwise if the fulfillment of that promise has already become impossible, and the seller knows that he cannot keep it, because he has already sold the same line of goods to a competitor of the purchaser.<sup>271</sup> For similar reasons, representations by the owner of a patent, in granting a license, that no more favorable terms would be given to any other manufacturer than were offered to the proposed licensee, being statements as to future action, cannot form the basis of a suit for rescission.<sup>272</sup> So, when a person is induced to sign or indorse a note by a promise that it will not be put into circulation, or that he will not be called upon to pay it or subjected to any liability upon it, his remedy is not by rescission of the contract, since a promissory representation of this kind does not constitute legal fraud.<sup>273</sup> And there is no legal fraud in inducing one to subscribe money for a given object by representing to him that he will not be required to pay more than a small part of his subscription, expected profits making up the remainder.<sup>274</sup> And in an action against a subscriber to recover the amount of his subscription, the defendant cannot show that he signed the paper on the assurance of the agent who presented it to him that he wanted his signature merely to influence others to sign, and that he would never be called on to pay, for such subscriber, being a party to the fraud, cannot claim any benefit from it.<sup>275</sup> And a promise to pay off or cancel an

<sup>270</sup> *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992. But see *Koerner v. Henn*, 8 App. Div. 602, 40 N. Y. Supp. 1021.

<sup>271</sup> *Bride v. Riffe*, 93 Neb. 355, 140 N. W. 639.

<sup>272</sup> *Huber v. Guggenheim* (C. C.) 89 Fed. 598. But compare *Rackemann v. Riverbank Imp. Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427.

<sup>273</sup> *Jackson v. Chemical Nat. Bank* (Tex. Civ. App.) 46 S. W. 295; *Kulenkamp v. Groff*, 71 Mich. 675, 40 N. W. 57, 1 L. R. A. 594, 15 Am. St. Rep. 283. See *Jones v. Crawford*, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105; *Calloway v. McKnight*, 180 Mo. App. 621, 163 S. W. 932.

<sup>274</sup> *Mullen v. Beech Grove Driving Park*, 64 Ind. 202.

<sup>275</sup> *Blodgett v. Morrill*, 20 Vt. 509.

existing incumbrance on land is not a representation concerning a present fact, and therefore is not ground for rescission.<sup>276</sup> And a bill which avers that a deed was made in order to get the grantor's tenant to vacate the property, and that the grantee promised to destroy the deed within a year, but has not done so, and asking its cancellation, is demurrable if it does not also allege a mistake of fact or a fraudulent intention on the part of the grantee.<sup>277</sup> Neither can the rescission of a contract be based on the breach of a promissory representation that a corporation will erect and equip a certain plant for the conduct of its business,<sup>278</sup> that the purchaser of land shall have the keeping of cattle connected with a near-by creamery,<sup>279</sup> that young nursery trees will attain a certain growth and appearance and manifest a certain vitality,<sup>280</sup> or that defendant can and will procure plaintiff's electric light bills to be cut in half and get certain rebates for him.<sup>281</sup> And the cancellation of a gas lease on the ground that it was procured by fraud will not be decreed, although the lessee, contrary to his promise made at the time of procuring it, is wasting the gas for the purpose of injuring other operators in the same field, where by so doing he subjects himself to a statutory penalty, since it will not be presumed that he will continue to do so.<sup>282</sup>

But it is necessary carefully to observe that representations are not to be regarded as promissory in their nature, so as to prevent rescission of a contract, where they do not so much relate to a future event as to existing facts, conditions, or arrangement, on which an expectation of that event may be founded.<sup>283</sup> For example, a statement by an

<sup>276</sup> *Burt v. Bowles*, 69 Ind. 1. See *Hill v. Gettys*, 135 N. C. 373, 47 S. E. 449.

<sup>277</sup> *Stacey v. Walter*, 125 Ala. 291, 28 South. 89, 82 Am. St. Rep. 235.

<sup>278</sup> *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838; *Killen v. Purdy* (Del. Ch.) 95 Atl. 908.

<sup>279</sup> *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051.

<sup>280</sup> *Pike v. Fay*, 101 Mass. 134.

<sup>281</sup> *Henry W. Boettger Silk Finishing Co. v. Electrical Audit & Rebate Co.* (Sup.) 115 N. Y. Supp. 1102.

<sup>282</sup> *Louisville Gas Co. v. Kentucky Heating Co.*, 117 Ky. 71, 77 S. W. 368, 70 L. R. A. 558, 111 Am. St. Rep. 225, 4 Ann. Cas. 355.

<sup>283</sup> *Garry v. Garry*, 187 Mass. 62, 72 N. E. 335; *O'Connor v. Light-*

agent employed to sell land divided into parcels, that he had sold a specified number of acres in parcels to individuals who had assured him of their intention to settle and build on the land within a specified time, is a statement of past facts, not only as to actual sales, but as to the assurances said to have been given by the purchasers, so that, if it was this consideration that induced the complainant to purchase, and if it was not true that any sales had been made, he is entitled to rescind.<sup>284</sup> Again, a representation relating to the future may be considered as a false statement of a present fact when the party making it has already put himself in a position where he cannot redeem his promise, as, where the seller of a special line of jewelry promises the purchaser that he shall have the exclusive sale of it in his city, but the same goods have already been sold to a competing merchant in that city.<sup>285</sup> And so, a statement made to subscribers for stock in a railroad company, that only a certain amount of stock and a certain amount of bonds will be issued for each mile of its road, when a greater amount of both stock and bonds has already been issued, is fraudulent and warrants a rescission of the subscription.<sup>286</sup> In the next place, a promise of future performance, when coupled with a false statement as to a past or existing fact or state of facts, which statement induces the person defrauded to rely on the false promise, will justify rescission or the cancellation of an obligation.<sup>287</sup> And another very important modification of the general rule has been thus expressed: While a failure to perform a mere promise does not amount to a false representation, yet if such promise is accompanied by statements of existing

hizer, 34 Wash. 152, 75 Pac. 643; *White Sewing Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634; *Gabriel v. Graham*, 168 App. Div. 847, 154 N. Y. Supp. 493.

<sup>284</sup> *Painter v. Lebanon Land Co.*, 164 Mich. 260, 127 N. W. 739, 130 N. W. 205.

<sup>285</sup> *Bride v. Riffe*, 93 Neb. 355, 140 N. W. 639.

<sup>286</sup> *Weems v. Georgia Midland & Gulf R. Co.*, 84 Ga. 356, 11 S. E. 503.

<sup>287</sup> *McDowell v. Commonwealth*, 136 Ky. 8, 123 S. W. 313; *Murphy v. Greybill*, 34 Pa. Super. Ct. 339; *Miller v. Fulmer*, 25 Pa. Super. Ct. 106; *Paine v. Baker*, 15 R. I. 100, 23 Atl. 141; *Martin v. Veana Food Co.*, 153 Mich. 282, 116 N. W. 978.

facts which show the ability of the promisor to perform, and without which the other party would not have accepted the promise, such statements are representations, and, if false, are ground for avoiding the contract, though the thing promised is wholly in the future.<sup>288</sup> For instance, if the promoters of a corporation promise a subscriber for stock that he shall be manager of the corporation when formed, this is not a misrepresentation of an existing fact but only a promissory representation, and not fraudulent in law, though they do not perform their agreement.<sup>289</sup> But if they tell him that they have already arranged with the other stockholders and the directors and have obtained their consent that he shall be appointed manager, this is a statement as to an existing fact, and one which induces the party to rely on the promise, and is therefore ground for rescinding the subscription.<sup>290</sup> On similar principles, false representations by a vendor of lots situated several miles from a city and two miles from a railroad station, to a prospective purchaser, that he was building cars and laying tracks and building a station on the premises, and had contracts to build a large number of houses, and had made arrangements to lay sewers and provide for lighting the place, though followed by promissory statements to the effect that he would run trains between designated points in a short time, were held to be material misrepresentations of fact.<sup>291</sup> So, where the lessees of a right to mine on certain land for a term of years at a royalty induced the grantor to give them the lease by representing to him that their operations would be conducted on a very large scale, that they were then making extensive preparations and would work a large force of men, and that they would be able to transport and ship from 100 to 500 tons a day, and that consequently the lessor's royalty would amount to at least \$10

<sup>288</sup> *Russ Lumber & Mill Co. v. Muscuplabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; *Birmingham Warehouse & Elevator Co. v. Elyton Land Co.*, 93 Ala. 549, 9 South. 235; *United States Home Co. v. O'Connor*, 48 Colo. 354, 110 Pac. 74.

<sup>289</sup> *Collins v. Southern Brick Co.*, 92 Ark. 504, 123 S. W. 652, 135 Am. St. Rep. 197, 19 Ann. Cas. 882.

<sup>290</sup> *Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420.

<sup>291</sup> *Sicklick v. Interurban Home Co. (Sup.)* 116 N. Y. Supp. 553.

a day, it was held that this was not a mere expression of opinion or a promissory representation, but one which would avoid the lease if made falsely and fraudulently.<sup>292</sup> In another case, the purchaser of land obtained the same at less than its value by representations that he desired it for a mill site, that he had several loads of mill machinery on the way, that he owned timber enough to keep the proposed mill running for ten years, that he would furnish the vendor all the firewood he needed from the mill without charge, and that he would give him employment in the mill at good wages. All this was false, and the grantee merely obtained the property for an adjoining owner, to whom he immediately transferred it. It was held that, notwithstanding the promissory nature of some of the representations, the defrauded vendor was entitled to a cancellation of the deed.<sup>293</sup> So again, representations by one contracting to bore wells, that he had certain appliances by which he could remedy the evil from an influx of quicksand, coupled with the assurance that he would put them into the wells if the contract was made, when in fact he had no such appliances, are representations as to a fact, and not mere promises to do something in the future.<sup>294</sup> And the same rule was applied in a case where a dishonest person succeeded in getting a conveyance of land from an unmarried woman by falsely representing to her that he was unmarried and by promising to marry her.<sup>295</sup>

Attention should also be directed to certain of the decisions which make the effect of a promissory representation depend upon the good or bad faith with which it is given. A general promise as to future events, dependent on future contingencies, thoroughly believed in by the person making the statement, is not actionable fraud, however badly he was mistaken in his opinion or judgment.<sup>296</sup> But a prom-

<sup>292</sup> *Rorer Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285.

<sup>293</sup> *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883.

<sup>294</sup> *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43.

<sup>295</sup> *Harris v. Dumont*, 207 Ill. 583, 69 N. E. 811.

<sup>296</sup> *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583. A purchaser of land is not entitled to rescission of the contract on account of promises made, which the vendor actually intended and



issory representation, made as an inducement to a contract, may invalidate it and entitle the other party to its cancellation if there was present an element of bad faith, an intention to deceive, or such a recklessness or extravagance of statement as can scarcely be distinguished from bad faith.<sup>297</sup> And if a person, being in a position to know, takes advantage of the confiding ignorance of another, not equally well situated, and falsely represents that a future event will certainly come to pass, and thereby induces the deceived party to enter into a disadvantageous contract, such misrepresentation cannot be excused as the mere expression of an opinion, but will be regarded as the utterance of a known falsehood for a fraudulent purpose, and will render the contract voidable.<sup>298</sup>

**§ 90. Same; Intention as to Performance or Non-Performance.**—While the authorities generally hold, as stated in the preceding section, that an unredeemed promise does not constitute a false representation such as will justify the rescission of a contract, yet it is also agreed that a promise or promissory representation made without any intention of performing it, or made with a positive intention not to perform it, and made by the promisor for the purpose of deceiving the promisee, and inducing him to act where he otherwise would not have done so, constitutes legal fraud.<sup>299</sup>

attempted to fulfill. *Henrickson v. Hillsboro Garden Tracts* (Or.) 152 Pac. 495.

<sup>297</sup> *Mamaux v. Cape May Real Estate Co.*, 214 Fed. 757, 131 C. C. A. 63; *Tauner v. Clark*, 13 Ky. Law Rep. 879.

<sup>298</sup> *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

<sup>299</sup> *Butler v. Watkins*, 13 Wall. 456, 20 L. Ed. 629; *Gewin v. Shields*, 167 Ala. 593, 52 South. 887; *Southern Loan & Trust Co. v. Glissendaner*, 4 Ala. App. 523, 58 South. 737; *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436; *Rheingans v. Smith*, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140; *Dowd v. Tucker*, 41 Conn. 197; *Ayres v. French*, 41 Conn. 142; *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386; *McLaughlin v. Thomas*, 86 Conn. 252, 85 Atl. 370; *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920; *Duvall v. Waggener*, 2 B. Mon. (Ky.) 183;

This rule, however, is not universally accepted. There are few subjects on which the courts have differed more widely than in regard to the various elements of an actionable fraud. And it is therefore not surprising to find a very respectable body of authorities maintaining the view that a charge of fraud cannot be predicated on a mere promise to do something in the future, although the party making it had the intention not to fulfill it.<sup>300</sup> But these decisions

*McComb v. C. R. Brewer Lumber Co.*, 184 Mass. 276, 68 N. E. 222; *Comstock v. Livingston*, 210 Mass. 581, 97 N. E. 106; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *McElrath v. Electric Inv. Co.*, 114 Minn. 358, 131 N. W. 380; *Olson v. Smith*, 116 Minn. 430, 134 N. W. 117; *Cox v. Edwards*, 120 Minn. 512, 139 N. W. 1070; *Culbertson v. Young*, 86 Mo. App. 277; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Stewart v. Emerson*, 52 N. H. 301; *Rogers v. Salmon*, 8 Paige (N. Y.) 559, 35 Am. Dec. 725; *Jones v. Jones*, 40 Misc. Rep. 360, 82 N. Y. Supp. 325; *Bernstein v. Lester* (Sup.) 84 N. Y. Supp. 496; *Herndon v. Durham & S. Ry. Co.*, 161 N. C. 650, 77 S. E. 683; *Braddy v. Elliott*, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 523; *American Hosiery Co. v. Baker*, 10 O. C. D. 219, 18 Ohio Cir. Ct. R. 604; *Koehler v. Dennison*, 72 Or. 362, 143 Pac. 649; *Blackburn v. Morrison*, 29 Okl. 510, 118 Pac. 402, Ann. Cas. 1913A, 523; *Jennings v. Jennings*, 48 Or. 69, 85 Pac. 65; *Brown v. Pitcairn*, 148 Pa. 387, 24 Atl. 52, 33 Am. St. Rep. 834; *Standard Interlock Elevator Co. v. Wilson*, 218 Pa. 280, 67 Atl. 463; *St. Louis Expanded Metal Fireproofing Co. v. Burgess*, 20 Tex. Civ. App. 527, 50 S. W. 486; *Touchstone v. Staggs* (Tex. Civ. App.) 39 S. W. 189; *May v. Cearley* (Tex. Civ. App.) 138 S. W. 165; *Chambers v. Wyatt* (Tex. Civ. App.) 151 S. W. 864; *Mutual Reserve Life Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945; *South Texas Mortgage Co. v. Coe* (Tex. Civ. App.) 166 S. W. 419; *Cearley v. May* (Tex.) 167 S. W. 725; *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374; *Blackburn's Case*, 3 Drew. 409. This rule has been enacted into law in the codes of several of the Western states. Civ. Code Cal., § 1572; Rev. Civ. Code Mont., § 4978; Rev. Civ. Code N. Dak., § 5293; Rev. Civ. Code S. Dak., § 1201; Rev. Laws Okl. 1910, § 903.

<sup>300</sup> *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *People v. Orris*, 52 Colo. 244, 121 Pac. 163, 41 L. R. A. (N. S.) 170; *Grubb v. Milan*, 249 Ill. 456, 94 N. E. 927; *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735; *Chambers v. Mitchell*, 123 Ill. App. 595; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Ayres v. Blevins*, 28 Ind. App. 101, 62 N. E. 305; *Missouri Loan & Investment Co. v. Federal Trust Co.*, 175 Mo. App. 646, 158 S. W. 111; *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94; *Adams v. Gillig*, 131 App. Div. 494, 115 N. Y. Supp. 999. A statement made to a subscriber for stock in a company, that the corporation intends to buy a certain newspaper, and that it will acquire a franchise to be furnished with news service by the Associated Press, is

are contrary to a great, if not overwhelming, preponderance of authority. Those which support the rule above stated proceed upon the theory that the purpose and intention with which a man gives a promise are present and existing facts. They are, it is true, psychological facts, but they are none the less present facts for not being material or tangible. The thing which is promised may lie wholly in the future. But a party's honest intention to redeem his promise, or his fraudulent intention to break it, is present in his mind at the moment it is given. And a misrepresentation as to this intention is a misrepresentation of an existing fact. As remarked in an English case: "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."<sup>801</sup> Now there is a *prima facie* presumption of fairness and honesty in the dealings of mankind, and where one man makes a promise to another as an inducement for a change of position on the part of the latter, he impliedly, if not expressly, avers that he has an existing intention to fulfill his promise, and such implied or express averment of an existing intention is of matter of fact, and if it is false and fraudulent, it is a fraudulent representation, which may, if acted on, furnish ground for the rescission of a contract or an action of deceit.<sup>802</sup>

Thus, in a case where the defendant procured a loan from the plaintiff, evidenced by a note and mortgage, on the promise to pay off a prior lien on the property mortgaged with the proceeds of the loan, but without any intention of

merely an opinion as to a future event, and though no such action is taken, it will not warrant a repudiation of the subscription. *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694.

<sup>801</sup> *Edgington v. Fitzmaurice*, 29 Law Rep. 479. And see *Laswell v. National Handle Co.*, 147 Mo. App. 497, 126 S. W. 969; *Old Colony Trust Co. v. Dubuque Light & Traction Co.* (C. C.) 89 Fed. 794.

<sup>802</sup> *Rogers v. Virginia-Carolina Chemical Co.*, 149 Fed. 1, 78 C. C. A. 615.

fulfilling such promise, and after obtaining the money used it for other purposes, it was held that the plaintiff was entitled to rescind the contract for fraud.<sup>303</sup> And a similar ruling was made in a case where a creditor induced his debtor to secure the debt by a chattel mortgage on the faith of the creditor's promise that he would not permit the property to be sold under foreclosure for less than a certain sum, which promise he secretly intended not to perform.<sup>304</sup> Again, where a contract secured to a publisher the right to publish certain songs in consideration of paying a certain royalty to the composer, a case for rescission is made out by showing that the publisher had no intention of ever publishing the songs, but merely made the agreement to prevent competition with other composers.<sup>305</sup> In another case, the purchaser of a steam plow was induced to accept an old machine by the seller's representation that it was as good as new, and by his promise that he would make it as good as new and supply any missing parts; but it appeared that the seller had no intention of doing anything of the kind, and it was held that the buyer was entitled to rescind.<sup>306</sup> So, where persons are induced to buy town lots by the exhibition by the vendors of certain improvements which have been begun by them for the purpose of deceiving the public and not with the intention of completing them, it is a fraud sufficient to avoid the contract.<sup>307</sup> And a cause of action is stated by a complaint which alleges that a corporation was organized to carry on fraudulent transactions, that its officers induced the plaintiff to convey his land to it under an agreement that the corporation would at the end of five years convey to the plaintiff other land on which an orange grove five years old was growing, and that the corporation did not own the land which should be thus conveyed, and never took any steps to acquire or improve the same.<sup>308</sup> And so of a bill alleging

<sup>303</sup> *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436.

<sup>304</sup> *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640.

<sup>305</sup> *Edmonds v. Stern*, 89 App. Div. 539, 85 N. Y. Supp. 665.

<sup>306</sup> *Geiser Mfg. Co. v. Lunsford* (Tex. Civ. App.) 139 S. W. 64.

<sup>307</sup> *Tauner v. Clark*, 13 Ky. Law Rep. 879.

<sup>308</sup> *Martin v. Lawrence*, 156 Cal. 191, 103 Pac. 913.

that defendant secured from plaintiff a conveyance of valuable property on his promise to procure a third party to build a line of railroad and operate it for twenty years as an independent and competing road, and to give plaintiff facilities for shipping coal from his land on such line, and that defendant did not intend to fulfill such promise, and in fact did not keep it, the road having been built and turned over to a rival company.<sup>809</sup> Again, where the inhabitants of a town were induced to give their notes to procure the extension of a railroad through their town, it being represented to them that if they did not subscribe the railroad would go through a rival town, whereas in fact the contract for the building of the road through their town had already been let, and the railroad had no intention of going through such rival town, it was held that they had the right by suit in equity to have the notes delivered up and cancelled for fraud.<sup>810</sup> And a voluntary conveyance by a husband to his wife, fraudulently procured by her by shamming affection for him and promising to resume their interrupted marital relations and conduct herself as a dutiful wife, when she really meant to abandon him and procure a divorce as soon as the conveyance was made, will be set aside for fraud.<sup>811</sup>

But to justify rescission on this ground, it is essential that the party giving the promise should have entertained a fraudulent purpose not to keep it, at the very time the promise was made, or that, at that time, he should have had no intention whatever of redeeming it. Where the making of a contract is induced by a promissory representation honestly made, and the party making it, at that time, fully intended to perform it and believed that he would be able to do so, rescission is not warranted by the fact that he is afterwards placed in a position where he cannot make good his word and therefore fails to do so.<sup>812</sup> The intention at

<sup>809</sup> *Ten Mile Coal & Coke Co. v. Burt* (C. C.) 170 Fed. 332.

<sup>810</sup> *Crawford v. Mobile, J. & K. C. R. Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476.

<sup>811</sup> *Basye v. Basye*, 152 Ind. 172, 52 N. E. 797; *Jennings v. Jennings*, 48 Or. 69, 85 Pac. 65.

<sup>812</sup> *Arnold v. Hagerman*, 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712; *State Bank of Indiana v. Gates*, 114 Iowa, 323, 86 N. W. 311; *Bigelow v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L. R. A. (N. S.) 203; *Neff v. Mattern* (Cal. App.) 151 Pac. 382.

the time of making the contract is the important matter; and it is not sufficient, in a bill for rescission, to allege that the party made the promise without any reasonable expectation on his part that he would be able to perform it; it must be alleged that the promise was given with an intent not to perform it.<sup>813</sup> Again, if the party honestly meant to keep his promise at the time it was given, but afterwards refuses to do so, not because he is unable, but by reason of a change in his plans or purposes, this may give rise to an action for damages for breach of the contract, but it is not such a fraud as will justify its rescission.<sup>814</sup> For instance, in one of the cases it appeared that a railroad company promised, in consideration of the grant to it of a right of way, to construct and maintain a station on the land granted, which it afterwards refused to do. It was held that, if the promise was made with a design to deceive the grantor, having no intention of performance at the time, that fact, with the refusal to maintain the station, would entitle the grantor to a cancellation of the deed on the ground of fraud; but if the contract was made in good faith, and the failure of performance was due to a subsequent change of plan, the grantor would only be entitled to his damages for breach of the contract, and the question of the company's good faith in making the contract was for the jury.<sup>815</sup> Where the promise is that a third person shall do a certain thing, the promisor is not responsible for failure of performance, if he believed, at the making of the contract, that the promise would be kept and correctly stated his reasons for entertaining such belief.<sup>816</sup>

The fraudulent intention not to fulfill a promise is naturally not a matter that is susceptible of direct proof, but it is sufficient for a decree granting relief if it can be clearly inferred from the facts and circumstances proved.<sup>817</sup> And

<sup>813</sup> *People's Sav. Bank v. James*, 178 Mass. 322, 59 N. E. 807.

<sup>814</sup> *New York Life Ins. Co. v. Miller*, 11 Tex. Civ. App. 536, 32 S. W. 550; *Brown v. Honiss*, 74 N. J. Law, 501, 68 Atl. 150.

<sup>815</sup> *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

<sup>816</sup> *Lambert v. Crystal Spring Land Co. (Va.)* 27 S. E. 462.

<sup>817</sup> *Blackburn v. Morrison*, 29 Okl. 510, 118 Pac. 402, Ann. Cas. 1913A, 523.

on the other hand, where one of the contracting parties has failed to fulfill a promise made to induce the contract, evidence of good faith on his part in making the promise, and of facts justifying his failure to perform it, is admissible to rebut the presumption of fraud.<sup>818</sup> And generally, proof of parol promises made at the time of a written contract is competent to show the good or bad faith of the parties in the transaction and in their subsequent conduct.<sup>819</sup>

§ 91. **Same; Promises as to Improvement or Use of Real Property.**—Where one induces another to sell land to him, or to give him a lease of premises, on the representation that he means to devote it to a certain use, whereas he has the secret intention to put it to an entirely different use, and one which is so inconvenient or detrimental to the grantor that he would not have made the bargain if he had known the truth, this is not regarded as a mere promise of future action, but as the statement of a material existing fact (the party's present intention) which will warrant the rescission of the contract. This rule is applied, for instance, in cases where one sells a lot adjoining his own residence on the buyer's statement that he means to erect a dwelling on it, whereas he really intends, and begins, to erect a manufacturing plant on it, or a garage.<sup>820</sup> So where one sells land for half what he considers it worth, upon the false representations of the vendee that it is to be used for a certain purpose, which would greatly enhance the value of the remainder of his property, whereas it was for another purpose, for which he would not have sold it, the sale will be set aside, even though the grantee may have paid all the land was actually worth.<sup>821</sup> The converse case is presented where a person is induced to purchase land of no great present value by false promissory representations concern-

<sup>818</sup> *Nelson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116.

<sup>819</sup> *Breyfogle v. Walsh*, 80 Fed. 172, 25 C. C. A. 357.

<sup>820</sup> *Adams v. Gillig*, 199 N. Y. 314, 2 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910; *Gale v. McCullough*, 118 Md. 287, 84 Atl. 469. But compare *Feret v. Hill*, 15 C. B. 207. And see *Brown v. Honiss*, 74 N. J. Law, 501, 68 Atl. 150; *Starnes v. Raleigh, C. & S. Ry.* (N. C.) 87 S. E. 43.

<sup>821</sup> *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618.



ing plans and projects which would greatly increase its value if carried out, especially in the case of sales of suburban property or lots in new towns. These representations may take the form of assurances that a railroad will enter the town, that a depot will be built near by, that a street railway will pass the property in question, that other buildings will be erected in the neighborhood, that streets will be laid out and graded, that waterworks will be constructed, that the lot in question will be connected with water and gas mains and sewers, that a company will be formed to irrigate agricultural lands, or the like. As to all such matters, the accepted rule is that, in so far as they relate to matters to be performed in the future by third persons, they are merely expressions of opinion and therefore not actionable fraud; and in so far as they constitute promises of future action by the vendor himself, they do not constitute ground for the rescission of the sale, unless, at the time, he had a specific intention not to redeem them, and simply used this device to deceive and cheat the purchaser.<sup>322</sup> On the other hand, it was held that a good cause of action for rescission of a sale was stated in a petition which alleged that the plaintiff was the owner of a town site which he had laid off into lots and blocks; that, with a view to enhancing the value of said lots, he had sold and conveyed a large number of them at much less than their value, upon a prom-

<sup>322</sup> *Harriage v. Daley* (Ark.) 180 S. W. 333; *Day v. Ft. Scott Inv. & Imp. Co.*, 153 Ill. 293, 38 N. E. 567; *Mamaux v. Cape May Real Estate Co.*, 214 Fed. 757, 131 C. C. A. 63; *Wabash R. Co. v. Grate*, 53 Ind. App. 583, 102 N. E. 155; *Mobley v. Quattlebaum*, 101 S. C. 221, 85 S. E. 585; *Livermore v. Middlesborough Town Lands Co.*, 106 Ky. 140, 50 S. W. 6; *Decatur Mineral & Land Co. v. Friedman*, 108 Ky. 189, 56 S. W. 11; *Huls v. Black*, 14 Ky. Law Rep. 805; *Parsons v. Detroit & M. Ry. Co.*, 122 Mich. 462, 81 N. W. 343; *Canon v. Farmers' Bank*, 3 Neb. (Unof.) 348, 91 N. W. 585; *Troxler v. New Era Building Co.*, 137 N. C. 51, 49 S. E. 58; *Western Townsite Co. v. Novotny*, 32 S. D. 565, 143 N. W. 895; *Anderson v. Creston Land Co.*, 96 Va. 257, 31 S. E. 82; *Moore v. Barksdale* (Va.) 25 S. E. 529; *Slothower v. Oak Ridge Land Co.* (Va.) 27 S. E. 466; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583; *Manns v. Boston Harbor R., S. S. & Land Co.*, 82 Wash. 411, 144 Pac. 535. But see *Kaufmann v. McLaughlin*, 24 Misc. Rep. 603, 54 N. Y. Supp. 160; *Roberts v. James*, 83 N. J. Law, 492, 85 Atl. 244, Ann. Cas. 1914B, 859; *Garrett v. Finch*, 107 Va. 25, 57 S. E. 604.

ise by the purchasers that they would erect buildings thereon and become residents of the town; that he had sold and conveyed to the defendant one of the lots for a nominal price and for the further consideration of the defendant's promise that he would construct a building of a specified size on the lot within a certain time, which the defendant had neglected and refused to do.<sup>323</sup>

§ 92. **False Representations as to Agency, Authority, or Official Character.**—Where a person induces another to sell him goods by representing that he is buying as the agent of a certain firm or corporation, when he is really buying for himself, it is a fraud upon the seller which entitles the latter to rescind the contract of sale.<sup>324</sup> And so where the buyer represents that he is a member of a certain firm, for whom the purchase is made, but is in reality only an employé of the firm,<sup>325</sup> or where he falsely represents that he is interested in the matter solely for a certain party, for whom he is acting, the truth being that he is acting for himself conjointly with a different party,<sup>326</sup> or where the purchaser of land represents that he wants it for himself, and so is enabled, for special and personal reasons, to get it at a low price, when in reality he is acting for a third person to whom he immediately transfers it.<sup>327</sup> So it appeared in another case that the mortgagors of certain property, being unable to pay the mortgage debt when due, proposed to the defendant, who was the agent of the mortgagee, that they should convey the mortgaged lands to the mortgagee in satisfaction of the debt. The defendant consulted with the mortgagee, and was authorized to accept this proposition, but he falsely stated to the mortgagors that his principal would not accept the premises and release the debt, unless the mortgagors would also convey to him a certain five-acre tract of land in addition. The mort-

<sup>323</sup> Willard v. Ford, 16 Neb. 543, 20 N. W. 859. But see Tacoma Water Supply Co. v. Dumermuth, 51 Wash. 609, 99 Pac. 741; State v. Blize, 37 Or. 404, 61 Pac. 735.

<sup>324</sup> Mayhew v. Mather, 82 Wis. 355, 52 N. W. 436.

<sup>325</sup> Howe v. Combs, 18 Ky. Law Rep. 1002, 38 S. W. 1052.

<sup>326</sup> Robinson v. Richards, 209 Mass. 295, 95 N. E. 790.

<sup>327</sup> Grundy v. Louisville & N. R. Co., 98 Ky. 117, 32 S. W. 392.

gagors, relying on this representation, and being threatened with a deficiency judgment if they did not comply with the demand, conveyed the mortgaged premises to the mortgagee, and conveyed the five acres to one to whom the defendant stated the mortgagee wished it to be conveyed, but who was in fact receiving it for the defendant, to whom he afterwards transferred it, the mortgagee knowing nothing about it. It was held that such a fraud had been perpetrated upon the mortgagors as entitled them to recover the land from the defendant.<sup>828</sup> On somewhat similar principles, ground for rescission was found in certain fraudulent representations made by the agent of the purchaser of land, that the purchaser was a man of means with a small family who wanted the lot, which was next to the vendor's residence, for a home, whereas the purchaser was a religious society which wanted the land for the purpose of building a church on it.<sup>829</sup> And in an action for fraudulent representations, relief may be granted on a showing that defendant falsely represented that he was the agent for certain property, and that plaintiff, relying thereon, contracted with him for its purchase, and that at the time defendant was not such agent, and that, instead of applying the money for the purchase of the land, he fraudulently converted it.<sup>830</sup> And generally, an action will lie against one who deceives and causes damage to the plaintiff by falsely representing himself to be a public officer.<sup>831</sup>

**§ 93. Representations by Agents and Other Third Persons.**—In order that a person should be held liable for false and fraudulent representations, to the extent of having a contract made with him rescinded or an obligation given to him canceled, it is not necessary that the representations should have been made directly by him, but the effect is the same if they were made by his duly authorized agent or representative.<sup>832</sup> But it is requisite that the agent or rep-

<sup>828</sup> *Cook v. Skinner*, 50 Wash. 317, 97 Pac. 234.

<sup>829</sup> *Thompson v. Barry*, 184 Mass. 429, 68 N. E. 674.

<sup>830</sup> *Gandy v. Cummins*, 64 Neb. 312, 89 N. W. 777.

<sup>831</sup> *Commonwealth v. Woods*, 11 Metc. (Mass.) 59.

<sup>832</sup> *Pictorial Review Co. v. Gerald FitzGibbon & Son*, 163 Iowa, 644, 145 N. W. 315; *Smither v. Calvert*, 44 Ind. 242; *Woods v.*

representative should have been directly authorized to make the representations complained of, or else that the transaction in question (not necessarily the representations) should have been within the scope of his general or special employment.<sup>333</sup> Or the same result will follow if the principal, not having authorized the representations to be made, knows of their having been made and approves of the agent's course in so making them,<sup>334</sup> or if he ratifies an entirely unauthorized and fraudulent act of his agent, in respect to making such representations, by failing to explain or repudiate after acquiring knowledge of the way in which the bargain was induced, and by accepting and retaining the fruits or benefits of the contract.<sup>335</sup> But fraud cannot be charged against a party to a contract or other transaction on account of fraudulent misrepresentations made by a

Pine Mountain R. Co. (Ky.) 113 S. W. 94; Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25; Michigan Mut. Life Ins. Co. v. Reed, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349; Tiffany v. Times Square Automobile Co., 168 Mo. App. 729, 154 S. W. 865; Shoudy v. Reeser, 48 Mont. 579, 142 Pac. 205; Delouche v. Metropolitan Life Ins. Co., 69 N. H. 587, 45 Atl. 414; Keeler v. Seaman, 47 Misc. Rep. 292, 95 N. Y. Supp. 920; White Sewing Machine Co. v. Bullock, 161 N. C. 1, 76 S. E. 634; United States Life Ins. Co. v. Wright, 33 Ohio St. 533; Equitable Life Assur. Soc. v. Maverick (Tex. Civ. App.) 78 S. W. 560; Johns v. Coffee, 74 Wash. 189, 133 Pac. 4. See F. C. Austin Mfg. Co. v. Decker, 109 Iowa, 277, 80 N. W. 312. A principal may, without inquiry, rely upon the statements of his own agent or confidential adviser, as to the details of a transaction or the contents of a written instrument. Robinson v. Glass, 94 Ind. 211; Pouppirt v. Greenwood, 48 Colo. 405, 110 Pac. 195. And see, *supra*, § 42. But where a contract for the sale of an acetylene gas plant was made directly with the seller, and at that time no representations were made as to the relative cost of acetylene gas and electricity, and the contract was silent on the subject, and there was no fraud or mistake in the contract, it cannot be rescinded for a misrepresentation by an agent of the seller some time before as to the relative cost of the two systems of lighting. Daylight Acetylene Gas Co. v. Hardesty (Ky.) 112 S. W. 847.

<sup>333</sup> Wallace v. Hallowell, 66 Minn. 473, 69 N. W. 466; Roper v. Noel, 32 S. D. 405, 143 N. W. 130. A grantor who does not know the boundaries of his land, and sends a mere farm hand to point them out, is not liable for false information given by the latter without any fraudulent intent. Tarault v. Selp, 158 N. C. 363, 74 S. E. 3.

<sup>334</sup> Travis v. Taylor (Ky.) 118 S. W. 988.

<sup>335</sup> Forster v. Wilshusen, 14 Misc. Rep. 520, 35 N. Y. Supp. 1083; Folx v. Moeller (Tex. Civ. App.) 159 S. W. 1048.

stranger, having no authority to act for such party, where he himself took no part in the fraud and was not cognizant of the deception practised on the other party.<sup>336</sup> Thus, although a person was induced to subscribe for stock in a corporation by false and fraudulent representations made to him, yet if they did not proceed from any person authorized to act in behalf of the corporation or to represent it, but from a mere stranger, they furnish no ground for rescinding the contract of subscription; nor does it alter the case that such stranger was himself a subscriber for stock, and interested in getting others to subscribe.<sup>337</sup> So, fraudulent representations as to the extent or value of property to be purchased by a syndicate formed for that purpose cannot be set up against a note given by one of the members of the syndicate for his subscription to it, when such representations were made by his associates in the syndicate and by the promoters thereof, but not by the vendor.<sup>338</sup> Again, a purchaser is not entitled to a rescission by reason of misrepresentations made by remote vendors in selling the property.<sup>339</sup> And a mortgagee of a dwelling house is not liable for alleged misrepresentations as to its sanitary condition made by the mortgagor in possession in letting the same, in the absence of any evidence that he was acting as the agent of the mortgagee.<sup>340</sup> So where a party, before closing a contract for the sale of property, agrees to be governed by the report of a third person as to the quality and value of the lands offered to him, and such third person examines the land and the contract is closed on his report, it cannot be set aside on the ground of fraudulent misrepre-

<sup>336</sup> *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Dec. 147; *Brounfield v. Denton*, 72 N. J. Law, 235, 61 Atl. 378; *Equitable Life Assur. Soc. v. Cosby* (Ky.) 126 S. W. 142; *Maney v. Morris* (Tenn. Ch. App.) 57 S. W. 442. See *Hughes v. Lockington*, 221 Ill. 571, 77 N. E. 1105.

<sup>337</sup> *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601. And see *Duranty's Case*, 26 Beav. 268; *Cunningham v. Edgefield R. Co.*, 2 Head (Tenn.) 23.

<sup>338</sup> *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830.

<sup>339</sup> *Jones v. Middlesborough Town Lands Co.*, 106 Ky. 194, 50 S. W. 28.

<sup>340</sup> *Tilden v. Greenwood*, 149 Mass. 567, 22 N. E. 45.

sentations by such third person, unless it is shown that he was in collusion with the other party to the contract.<sup>841</sup> But though a person refrains from making any false representations, yet if he takes advantage of a misrepresentation proceeding from a third person and turns it to his own advantage and to the detriment of the other party, he is responsible for it. This was ruled, for instance, in a case where the register of deeds unintentionally made a mistake in an abstract of title prepared by him, and the vendor of the land, perceiving it, used it to deceive the purchaser in a material point.<sup>842</sup> So, one guilty of fraud cannot escape responsibility by sending his victim to a confederate for an opinion.<sup>843</sup> But it is not sufficient evidence of one's commission of a fraudulent act that it was for his interest, and that of no one else, to have the act done; as, where fictitious letters offering to buy land in a distant state at more than its real value, are shown to an intending purchaser and influence him in deciding to buy, but no complicity on the part of the owner of the land is shown, though it is shown that he is the only person who could have been benefited by the letters.<sup>844</sup> However, there are cases in which complicity in a fraud has been held established by evidence not much stronger than this. Thus, in a case in Oklahoma, a husband was induced by his affection for his wife and by representations made to him by the physician who was treating her for an illness to give her a deed of certain of his lands. But afterwards he discovered that the representations were false, and that his wife and the doctor were living in illicit relations, and it was held that he was entitled to have the deed canceled for fraud.<sup>845</sup>

There are also cases in which agency or authority to act for another may be implied from the relations of the parties. For example, where the president of a corporation is the chief executive officer and head of the company, under the by-laws, with general control of its business, and is engag-

<sup>841</sup> *Schramm v. O'Connor*, 98 Ill. 539.

<sup>842</sup> *Scadin v. Sherwood*, 67 Mich. 230, 34 N. W. 553.

<sup>843</sup> *Barron v. Myers*, 146 Mich. 510, 109 N. W. 862.

<sup>844</sup> *Hanna v. Rayburn*, 84 Ill. 533.

<sup>845</sup> *Rumbaugh v. Rumbaugh*, 39 Okl. 445, 135 Pac. 937.

ed, with the knowledge of the other directors, in placing treasury stock, he is to be regarded as authorized to represent the corporation in such matters, and any fraudulent representations which he makes while trying to sell the stock are within the scope of his employment and will bind the corporation.<sup>846</sup> So, a married woman who through her husband sells a lot is bound by his action in inducing the vendee to accept a deed conveying only a part of the lot, by his fraudulent representation that it conveyed the whole.<sup>847</sup> So, the two owners of a vessel are jointly liable in an action of deceit for fraudulent representations made by one of them, acting for both, in a sale of the vessel.<sup>848</sup> And generally, where one of the joint owners of property makes false representations in effecting the sale of it, and the other joint owners, knowing of such false representations, do not contradict them, but allow the sale to be completed and accept their share of the proceeds, the purchaser can maintain an action for deceit against them all jointly.<sup>849</sup> For similar reasons, both members of a firm are liable for false representations in a matter relating to the firm's business, though they were made by one partner only, without the knowledge of the other.<sup>850</sup>

**§ 94. Repeating Information Received from Third Persons.**—If one of the parties to a negotiation, in order to influence the other and induce him to act, repeats to him information which he has received from a third person, with respect to any matter material to the subject of the contract, it is his duty to report correctly what he has heard, without any misstatement, exaggeration, or concealment, to repeat only what he believes to be correct and trustworthy, and not to assert the matter as being within his own knowledge. If he does this, he will not be liable as for the making

<sup>846</sup> *Weissinger Tobacco Co. v. Van Buren*, 135 Ky. 759, 123 S. W. 289, 135 Am. St. Rep. 502.

<sup>847</sup> *Bell v. McJones*, 151 N. C. 85, 63 S. E. 646.

<sup>848</sup> *Cook v. Castner*, 9 Cush. (Mass.) 266; *White v. Sawyer*, 16 Gray (Mass.) 586.

<sup>849</sup> *O'Leary v. Tillinghast*, 22 R. I. 161, 46 Atl. 754.

<sup>850</sup> *Boston Foundry Co. v. Whiteman*, 31 R. I. 88, 76 Atl. 757, Ann. Cas. 1912A, 1334.



of false representations, although the information so received and repeated proves to have been entirely incorrect.<sup>351</sup> Thus, in one of the cases, it appeared that the plaintiff traded his farm for a tract of land owned by defendant in another state. Neither of the parties had any personal knowledge of the character or quality of the land in such tract, but defendant knew that plaintiff meant to occupy the land and devote it to agricultural purposes. Defendant exhibited to plaintiff a letter, which had been written by a stranger to a former owner of the land, and which described the property as favorably situated and of good quality and well timbered. It was on the strength of this letter that defendant himself had purchased the land, but at the time he showed it to the plaintiff he made no false statement or suppression of the truth in regard to it. On the contrary, he told the plaintiff that he would not be responsible for the description contained in the letter, as it might not be true, and that if plaintiff traded with him it must be at his own risk. He advised the plaintiff to visit the land and inspect it for himself, or to see the writer of the letter, of whose place of residence he informed him. But the plaintiff declined to take this trouble, agreed to make the proposed exchange at his own risk, and told several witnesses that he had traded "unsight unseen." Mutual conveyances were drawn up and executed, and possession of plaintiff's property given to defendant. The lands in question proved to be swamp lands, to a great extent overflowed with water, poorly timbered, wholly unfit for cultivation, and of very little value. But it was held that the plaintiff could have no relief in equity, since his own carelessness was responsible for his predicament, and defendant had made no false representations.<sup>352</sup> In another case, concerning the sale of oil lands, it appeared that the vendor had no personal knowledge of

<sup>351</sup> Davidson v. Jordan, 47 Cal. 351; Connell v. El Paso Gold Min. & Mill. Co., 33 Colo. 30, 78 Pac. 677; Hanson v. Kline, 136 Iowa, 101, 113 N. W. 504; Krause v. Cook, 144 Mich. 365, 108 N. W. 81; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783; Duryea v. Zimmerman, 121 App. Div. 560, 106 N. Y. Supp. 237; Boles v. Aldridge (Tex. Civ. App.) 153 S. W. 373; Lams v. Fish, 86 N. J. Law, 321, 90 Atl. 1105.

<sup>352</sup> Crist v. Dice, 18 Ohio St. 536.

the lands except what he derived from letters written by his brother, and that he made no representations of any kind to the purchaser except as to the contents of these letters and as to the reliable and trustworthy character of their writer. The court said: "If he intentionally misstated their contents, that would amount to a misrepresentation of a material fact, and would come within the established definition of deceit. If he knew that the information contained in the letters was false, and that the writer was not trustworthy and reliable, it would of course be fraudulent if by words or acts he induced the defendant to act and rely upon them and to incur damage and loss by such reliance. But if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowledge on the subject-matter, such representations would not be fraudulent."<sup>353</sup>

But one cannot escape liability for fraud, on the plea that he merely repeated what he had heard from others, if he knows the information so repeated to be false, or if he has reason to believe that it is incorrect on account of the unreliable source from which it comes, or if he misstates the information in his possession, either by perverting it, exaggerating so much of it as is in his favor, or suppressing that which tells against him.<sup>354</sup> And if one asserts as a fact within his personal knowledge that which he has merely accepted on the word of another, he assumes responsibility for its correctness.<sup>355</sup> So again, although one states only what he has heard from others, he may put it in such a way as to guaranty its correctness or make himself responsible for its falsity.<sup>356</sup> Thus, where the seller of bank stock rep-

<sup>353</sup> *Cooper v. Lovering*, 106 Mass. 77.

<sup>354</sup> *Davidson v. Jordan*, 47 Cal. 351; *Johnson v. Withers*, 9 Cal. App. 52, 98 Pac. 42; *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *Boles v. Aldridge* (Tex. Civ. App.) 153 S. W. 373.

<sup>355</sup> *Fisher v. Mellen*, 103 Mass. 503; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727.

<sup>356</sup> *Johnson v. Withers*, 9 Cal. App. 52, 98 Pac. 42; *Stoll v. Wellborn* (N. J. Ch.) 56 Atl. 894. But see *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178.

resented to the buyer that the books of the bank were correctly kept, showed its true condition, and indicated what it had on deposit with other banks, and the representations were false, and the buyer relied on them, it was held that the seller was liable as for deceit, although he did not intend to misrepresent the facts and relied on information furnished by a defaulting officer of the bank.<sup>357</sup> So where one states that he "understands" that the owner of certain bonds had obtained a loan of a certain amount on them from a bank, this is to be regarded as a representation of a fact, and he cannot escape responsibility on the theory that it was merely the repetition of something which he had heard and which he intended to state simply as hearsay.<sup>358</sup> So, one falsely representing that land is in a certain situation and of a certain quality, and that the description is based on accurate and reliable information, is liable as for a fraud.<sup>359</sup> And where the sellers of timber assured the buyer that they had had the timber carefully estimated, and that the estimate showed certain quantities, it was held that such representations were not mere matters of opinion, but involved liability for fraud, if false.<sup>360</sup>

**§ 95. Representations to Third Parties Communicated to Plaintiff.**—To sustain a rescission of a contract or the cancellation of an obligation on the ground of fraud, it is not necessary that the false representations should have been made directly to the person defrauded, but the responsibility of the person setting them on foot is the same if they were made to a third person with the expectation and intention that they should be communicated to the injured party, and with the purpose of persuading or misleading him, and if they were so communicated and produced the intended result.<sup>361</sup> Thus, if measures resorted to in order

<sup>357</sup> *Barclay v. Deyerle*, 53 Tex. Civ. App. 236, 116 S. W. 123.

<sup>358</sup> *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498.

<sup>359</sup> *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504.

<sup>360</sup> *May v. Loomis*, 140 N. C. 350, 52 S. E. 728.

<sup>361</sup> *Langridge v. Levy*, 2 Mees. & W. 530; *National Bank of Savannah v. Kershaw Oil Mill*, 202 Fed. 90, 120 C. C. A. 362; *Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365; *Wells v. Western Union Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317; *Hadcock v. Osmer*, 153 N. Y. 604, 47

to obtain a deed of land were adopted with the intent of practising a deception on a particular person, and were all adapted to achieve that result, and if they did accomplish the unlawful purpose sought to be attained, then the fact that the words used in furtherance of such unlawful object were not directly addressed to the person designed to be defrauded, or in whose presence they were thus spoken, will not relieve the parties from responsibility for fraud.<sup>362</sup> So where a party, pursuant to a scheme to defraud, conveys worthless real estate for a fictitious consideration, part of which is recited to be for cash, and a trust deed is executed purporting to secure notes for the balance, and the notes contain a memorandum that they are secured by the trust deed, and a certificate by the trustee recites that such notes are part of a series secured by the trust deed, such statements being representations calculated to deceive, it is immaterial, in an action by a purchaser thereof for damages for deceit, that the defendant made no direct representations to him.<sup>363</sup> Again, where defendant and a third person were engaged in the common enterprise of organizing a corporation to take over an established business, and defendant made a statement to the third person as to the profits of the business, and meant that it should be used by the latter to induce persons to subscribe for stock in the proposed corporation, the defendant was held liable for fraud in an action by one who was thus induced to purchase the stock, the statement being false.<sup>364</sup> On the same principle, one is equally responsible for fraudulent representations whether they were made by himself or by a third person to whom he referred the other party for information with the expectation that he would be deceived. Hence,

N. E. 923; *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799; *Simonds v. Cash*, 136 Mich. 558, 99 N. W. 754; *Barnhart v. Anderson*, 22 S. D. 395, 118 N. W. 31; *Minneapolis Brewing Co. v. Grathen*, 111 Minn. 265, 126 N. W. 827; *Sigafus v. Porter*, 84 Fed. 430, 28 C. C. A. 443. The case last cited was reversed on appeal (179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113), but only on a question as to the measure of damages. See, also, *De Grasse v. Verona Min. Co.* (Mich.) 152 N. W. 242; *Lowance v. Johnson* (W. Va.) 84 S. E. 937.

<sup>362</sup> *Brown v. Brown*, 62 Kan. 666, 64 Pac. 599.

<sup>363</sup> *Leonard v. Springer*, 197 Ill. 532, 64 N. E. 299.

<sup>364</sup> *Diel v. Kellogg*, 163 Mich. 162, 128 N. W. 420.

where the purchaser of property, to induce the vendor to take bank stock in payment for it, knowingly misrepresents the value of the stock, and sends the vendor to the president of the bank to inquire as to its value, expecting that officer to give him false information, and allows the contract to be executed with knowledge that the vendor is acting on such false information, it is a fraud authorizing the rescission of the contract.<sup>865</sup>

But on the other hand, one who makes a false representation to another, not intending or anticipating that it shall be communicated to a third person, is not liable to such third person, though the latter does come into possession of such false statement and relies on it to his damage.<sup>866</sup> Thus, a private letter written by defendant to his agent cannot form the basis for an action of fraud or deceit merely because the agent communicated the contents to a third person, in the absence of anything to show that defendant meant him to do so.<sup>867</sup> And a cause of action for deceit based on misrepresentations made by the owner of property to persons to whom he gave an exclusive agency to sell the property, in the form of an option to purchase, does not pass to a purchaser of the option to whom the misrepresentations were not made.<sup>868</sup> So a judgment creditor of an insolvent corporation, suing incorporators for fraud, cannot predicate his action on statements contained in the articles of association, as they were not made to him to procure credit, but to the state officials to procure a charter.<sup>869</sup> And the fact that a state insurance commissioner was induced to issue a license to do business to an insurance company by a certificate made by a bank, falsely stating that the company had the full amount of its capital stock on deposit therein, does not give a right of action against the bank for fraud and deceit

<sup>865</sup> *Graham v. Moffett*, 119 Mich. 303, 78 N. W. 132, 75 Am. St. Rep. 393.

<sup>866</sup> *Western Union Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678.

<sup>867</sup> *People v. Green*, 22 Cal. App. 45, 133 Pac. 334.

<sup>868</sup> *Puffer v. Welch*, 144 Wis. 506, 129 N. W. 525, Ann. Cas. 1912A, 1120.

<sup>869</sup> *McKee v. Rudd*, 222 Mo. 344, 121 S. W. 312, 133 Am. St. Rep. 529.

to one who purchased stock of the company solely in reliance on the fact that it had been licensed to do business, or even in reliance on such certificate as a part of the public records, but the plaintiff in such case must show some direct connection between the bank and the communication of the statement, either to himself personally or to the general public. It is, however, sufficient to establish such a connection, and to give a right of recovery, that the bank, knowing that plaintiff contemplated the purchase of stock, referred him to such certificate for information, and that he acted on the information obtained therefrom.<sup>870</sup> But it seems that, in a suit brought to avoid a contract for fraud, testimony of representations made by the defendant to other persons can be used to prove that he had formed a design to commit a fraud in the manner shown if an opportunity should offer.<sup>871</sup>

§ 96. Representations to the General Public.—Where a person knowingly makes false representations concerning a material matter, with the expectation that they will come to the knowledge of various persons as yet unidentified, and with the intention that some one or more of such persons shall be influenced by such representations to enter into a contract or incur an obligation in reliance thereon, he cannot escape liability to a person who is so influenced to change his position to his detriment by the plea that the representations were not made personally to such party; for it is sufficient if they are made to the public at large for the purpose of entrapping any person who may acquire knowledge of them and act upon them.<sup>872</sup> The most familiar illustration of this rule is found in the case of a prospectus issued by the promoters of a corporation in pro-

<sup>870</sup> *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108.

<sup>871</sup> *Bradley v. Chase*, 22 Me. 511.

<sup>872</sup> *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011; *Greene v. Mercantile Trust Co.*, 60 Misc. Rep. 189, 111 N. Y. Supp. 802 (affirmed, 128 App. Div. 914, 112 N. Y. Supp. 1131); *Keeler v. Seaman*, 47 Misc. Rep. 292, 95 N. Y. Supp. 920; *Fisher v. Radford*, 153 Mich. 385, 117 N. W. 66; *Wells v. Western Union Tel. Co.*, 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045, 138 Am. St. Rep. 317.

cess of formation, or by the officers of an existing corporation, describing its financial condition, resources, property, and other material matters, and inviting the general public to subscribe for shares of its stock. In such cases, allowance must be made for pardonable exaggerations, and also it must be remembered that statements as to what the corporation expects or hopes to do in the future are merely expressions of opinion. But as to present and existing facts, if the paper contains false, misleading, or deceptive statements, it is a fraud, justifying rescission, as to any person who is induced by it to give in his subscription, and it is not material at all that the particular person who complains was not in the minds of the authors of the prospectus, nor in any way singled out as a victim, the invitation to the public being equivalent in law to a particular invitation to any person who acts on it.<sup>873</sup> In one of the English cases it was said: "Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and I have no doubt that the directors in the present case knew that this particular report would, a few hours after its publication, be in the hands of all share-brokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs by the perusal of it were induced to buy shares in the bank. I have, therefore, no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs is most completely established."<sup>874</sup>

<sup>873</sup> Manning v. Berdan (C. C.) 135 Fed. 159; Boshier v. Richmond & H. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; Oakes v. Turquand, L. R. 2 H. L. 325; Ross v. Estates Investment Co., L. R. 3 Ch. App. 682; Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99; Scott v. Dixon, 29 Law J. Exch. 62, note; Ligon v. Minton (Ky.) 125 S. W. 304.

<sup>874</sup> Scott v. Dixon, 29 Law J. Exch. 62, note.



A proper ground for the application of this rule is also found in the case of reports made by corporations, in compliance with the law, to various state officers. Thus, in a case in Iowa, the action was based upon a false statement of the financial condition of an insurance company. The statutes of that state required such companies to file such statements with the state auditor, setting out certain prescribed data, and that the auditor should arrange the information contained in the statement and report the result to the governor of the state, and also that these reports should be printed and distributed as part of the annual report of the auditor, and further, that the companies themselves should annually publish a certificate showing their aggregate amount of assets and liabilities. The plaintiff bought stock in an insurance company from a third person, who was a stockholder, on the faith of reports of this character, and afterwards brought an action of deceit against the secretary of the company, on the ground that the reports so made and published were false and fraudulent. It was held that, since the statutes required wide publicity to be given to the statements so filed, the latter were to be regarded as intended for the protection of individual members of the general public, and that any person purchasing the stock was entitled to rely on them, and therefore the plaintiff's action would lie. Said the court: "Insurance companies know that their reports are thus made public, and it is not going too far to say that they make them as favorable to their interests as the facts will warrant, for the express purpose of inducing public confidence, and by so doing to increase the volume of their business. \* \* \*

It is said, however, that in the purchase of stock from a third person the plaintiff had no right to rely upon the representations made in the statement sworn to and filed by the defendant. If the defendant in fact falsely reported the financial condition of his company for the purpose of deceiving the public in relation to its responsibility as an insurer, it seems clear to us that we should not say as a matter of law that he only intended to wrong that particular class, and that those dealing in its stock were not his intended victims; for he knew that stock in such companies

was often bought and sold, and that reliance might be placed upon his sworn statement by those dealing therein.”<sup>875</sup> So in Massachusetts, where the law requires corporations to file an annual certificate, signed and sworn to by certain officers and directors, and setting forth the amount of their assets and liabilities, it was held that a plaintiff who had sold goods to a corporation on the faith of such a return, which was false, was entitled to rescind the sale and recover the goods in replevin.<sup>876</sup> On the same principle, directors of a national bank who, in simulated performance of the duties prescribed by law, knowingly make and publish false statements and reports of the financial condition of the bank, with intent to deceive, are liable in an action of deceit for the damages suffered by a person who has relied thereon, though not made directly to him.<sup>877</sup> Again, if a person offers property for sale by a published advertisement, he is considered as addressing it directly to any person who may be interested, and is responsible for its correctness to any one who buys in reliance on it. Thus, one who buys a lot relying on a newspaper advertisement authorized by the owner of the property, which falsely represented its frontage to be 54 feet greater than it was, cannot be compelled to perform his contract.<sup>878</sup> In another case, the defendant, who was the owner of lands in another state, granted them to one B., who in turn granted them to M., but instead of making out a new deed, B. returned his deed to the defendant, who erased B.’s name as grantee, and then sent the deed to M. with the place for the grantee’s name left blank. During the negotiations, M. was shown an abstract of title to the lands, showing the title to be in the

<sup>875</sup> *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833. In this case it was further held to be immaterial that the statement of the company had not yet been published and distributed, as required by law, at the time of the purchase of stock, where it had been filed in the auditor’s office, and was there examined by the purchaser.

<sup>876</sup> *Steel v. Webster*, 188 Mass. 478, 74 N. E. 686.

<sup>877</sup> *Stuart v. Bank of Staplehurst*, 57 Neb. 569, 78 N. W. 298; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244; *Macdonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73.

<sup>878</sup> *McIntyre v. Harrington*, 43 Misc. Rep. 94, 87 N. Y. Supp. 1028.

defendant, and was allowed to take a verified copy of it, but not to keep the original, which B. represented was obtained from defendant and must be returned to him. M. then conveyed the lands to the plaintiff, giving the deed in blank and the copy of the abstract. It was held, in an action for deceit, that by putting the deed in blank in circulation, and allowing a verified copy of the abstract to accompany it, defendant represented to plaintiff that he believed himself to have been the owner of the land.<sup>379</sup>

But some of the cases have proposed a limitation upon this doctrine where the representations in question were not addressed to the broad general public, but to a special or limited class of persons. And it is said that where a false prospectus (for example) is addressed to a limited class only, as the persons intended to be influenced by it, then as a rule persons outside that class, with whom the persons issuing the statement have no dealings, but who may have been injured by reliance on such statements independently coming to their knowledge, cannot maintain an action on them for fraud and deceit.<sup>380</sup> Thus, it has been held that officers or promoters of a corporation, who make false representations in respect to its property and affairs in a prospectus, to induce persons to buy its treasury stock from the corporation at par, do not thereby become liable in damages to one who buys stock from another stockholder at less than par, though he may do so in reliance on such representations.<sup>381</sup> In the case cited it was said: "While the sponsors for false prospectuses that are issued to bring in money to the common treasury are justly made to respond to all persons who take the invited action, yet the law recognizes no right of action in one who relies without invitation on a statement addressed to a particular class which he stays out of. \* \* \* While the defendants' deceit may afford a ground of action in favor of those who were misled into paying their money or prop-

<sup>379</sup> *Baker v. Hallam*, 103 Iowa, 43, 72 N. W. 419.

<sup>380</sup> *Greene v. Mercantile Trust Co.*, 60 Misc. Rep. 189, 111 N. Y. Supp. 802 (affirmed, 128 App. Div. 914, 112 N. Y. Supp. 1131).

<sup>381</sup> *Cheney v. Dickinson*, 172 Fed. 109, 96 C. C. A. 314, 28 L. R. A. (N. S.) 359.

erty into the treasury for stock sold by the company, the deceit does not run with the stock into the hands of subsequent transferees." But while it may be admitted that this particular decision was correct, still the general current of authority is more in accordance with the theory that, where false representations are addressed to the indiscriminate public, or are intended for general circulation and publicity, the author of them is responsible for the resultant damages, although the injured party did not deal with him directly, but with a third person.<sup>382</sup>

**§ 97. Representations to Commercial Agencies.—** Where a person, firm, or corporation makes false representations to a commercial or mercantile agency, concerning his or its assets and liabilities, resources, or financial condition, for the purpose of securing a rating, and a third person legitimately acquires knowledge of such statements or of the rating based thereon, and relies on the same, and is thereby induced to enter into a contract, make an investment, or sell goods, it is regarded in law as a fraud practised directly upon the person so misled to his injury, and entitles him to rescind the contract or recover the goods sold or to any other remedy appropriate in such a case.<sup>383</sup> The reason is that a person who gives to a mer-

<sup>382</sup> *Bank of Atchison County v. Byers*, 139 Mo. 627, 41 S. W. 325; *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833; *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011. Compare *Hoeft v. Kock*, 119 Mich. 458, 78 N. W. 556.

<sup>383</sup> *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011; *In re Epstein* (D. C.) 109 Fed. 874; *Fechheimer v. Baum* (C. C.) 37 Fed. 167; *McKenzie v. Weineman*, 116 Ala. 194, 22 South. 508; *Triplett v. Rugby Distilling Co.*, 66 Ark. 219, 49 S. W. 975; *Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *George D. Mashburn & Co. v. Dannenberg*, 117 Ga. 567, 44 S. E. 97; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Tennent Shoe Co. v. Stovall*, 25 Ky. Law Rep. 1615, 78 S. W. 417; *Courtney v. William Knabe & Co. Mfg. Co.*, 97 Md. 499, 55 Atl. 614, 99 Am. St. Rep. 456; *Frisbee v. Chickering*, 115 Mich. 185, 73 N. W. 112; *Genesee Sav. Bank v. Michigan Barge Co.*, 52 Mich. 164, 17 N. W. 790; *Stevens v. Ludlum*, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; *Charles P. Kellogg Co. v. Holm*, 82 Minn. 416, 85 N. W. 159; *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427, 60 N. E. 771; *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Bliss v. Sickles*, 142 N. Y. 647, 36 N. E. 1064; *Converse v. Sickles*, 161 N. Y. 666, 57 N. E. 1107;

cantile agency information as to his financial condition knows that such details are gathered by the agency for the sole benefit of its patrons or subscribers, not for any purposes of its own, and therefore he must be held to have authorized the agency to communicate his statements to its customers, and must have intended that they should be so communicated and that they should be relied on by those to whom they are made known.<sup>884</sup> Hence in such a case, where rescission is sought, it is entirely immaterial that the false representations were not made directly to the person injured, neither is it necessary that the person making the false representations should have had the plaintiff in mind when he made them or entertained a fraudulent purpose as against him personally, nor even that he should have known the injured party to be a subscriber to the agency or likely to come into possession of the information furnished to it.<sup>885</sup> But while these rules undoubtedly apply in cases where the defrauded party is a patron or subscriber of the commercial agency, and therefore entitled to call upon it for information, the case is not quite so clear when he obtains his information at second or third hand, that is, not directly from the agency, but more or less immediately from one of its customers. However, there is an important decision of a federal court which carries the doctrine even as far as this. It appeared that the plaintiff was negotiating for the purchase of some of the treasury stock of a corporation. The corporation, through its president, had made a

*Arnold v. Richardson*, 74 App. Div. 581, 77 N. Y. Supp. 763; *Ralph v. Fon Dersmith*, 10 Pa. Super. Ct. 481; *Ernst v. Cohn* (Tenn. Ch. App.) 62 S. W. 186; *Aultman v. Carr*, 16 Tex. Civ. App. 430, 42 S. W. 614; *Schwartz v. Mittenthal* (Tex. Civ. App.) 50 S. W. 182; *Katzenstein v. Reid*, 41 Tex. Civ. App. 106, 91 S. W. 360. Compare *Dorman v. Weakley* (Tenn. Ch. App.) 39 S. W. 890.

<sup>884</sup> *Soper Lumber Co. v. Halsted & Harmount Co.*, 73 Conn. 547, 48 Atl. 425; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Converse v. Sickles*, 161 N. Y. 666, 57 N. E. 1107.

<sup>885</sup> *Tindle v. Birkett*, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822; *Mills v. Brill*, 105 App. Div. 389, 94 N. Y. Supp. 163; *George D. Mashburn & Co. v. Dannenberg*, 117 Ga. 567, 44 S. E. 97; *Pier Bros. v. Doheny*, 93 App. Div. 1, 86 N. Y. Supp. 971. Contra, *American Lumber & Mfg. Co. v. Taylor*, 137 Fed. 321, 70 C. C. A. 21.

statement of its financial condition to Dun & Company, which was false in material particulars. The plaintiff obtained knowledge of the particulars of this statement, and relied on it, and purchased and paid for the stock. But he did not obtain his information directly from Dun & Company, but through a friend from whom he expected to borrow part of the money to pay for the stock. This friend was not a subscriber to the agency in question, but obtained its report through a corporation in which he had an interest and which was one of its patrons. It was held that the plaintiff was entitled to rescind his contract for the purchase of the stock and recover his money.<sup>386</sup>

But in any case, to entitle the injured party to rescind, the evidence must connect the defendant with the making of the false report on which reliance was placed,<sup>387</sup> and if a commercial agency gives a merchant a rating which is false or too high, but which is not based on statements made by the merchant, a sale made to him on the strength of that rating cannot be rescinded unless he referred the vendor to it with approval.<sup>388</sup> And where a merchant, called on by a reporter for a mercantile agency, makes a statement of his affairs which is true, or which is not shown to have been false, he is not responsible for the conclusions drawn by the agency from the facts which he states, and though the agency may give him a higher rating than is deserved, or make prognostications as to his business success which are too favorable, this is not sufficient to charge him with any fraud.<sup>389</sup>

Next, it is necessary that the false or misleading statement should have taken the form of an assertion of fact. Thus, the mere statement by a merchant to a commercial agency of his opinion that his stock was worth a certain sum, which was communicated to a wholesaler by the

<sup>386</sup> *Davis v. Louisville Trust Co.*, 181 Fed. 10, 104 C. C. A. 24, 30 L. R. A. (N. S.) 1011. But compare *Irish-American Bank v. Ludlum*, 49 Minn. 344, 51 N. W. 1046.

<sup>387</sup> *Cream City Hat Co. v. Tollinger*, 62 Neb. 98, 86 N. W. 921.

<sup>388</sup> *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316.

<sup>389</sup> *Ralph v. Fon Dersmith*, 3 Pa. Super. Ct. 618; *Bennett v. Apsley Rubber Co.*, 54 Neb. 553, 74 N. W. 821.

agency as an opinion only, with a statement by the agency that it regarded the valuation as too high, even if relied on by the wholesaler in selling goods to the merchant on credit, does not constitute a fraudulent representation authorizing rescission of the sale.<sup>890</sup> Again, it is said that the statements made must have been willfully false, and that no fraud is committed if the person states his financial condition to the mercantile agency fairly and correctly as he himself understands it at the time, though it may prove to have been incorrect,<sup>891</sup> or if he makes even an intentionally false statement as to the extent of his liabilities, but the same is made correct, by the reduction of his debts, before credit is extended to him on the faith of it.<sup>892</sup> But there is a contrary line of authorities, holding that, in such matters, a person in business is bound to know his financial status, and cannot plead ignorance of his real condition, or an honest belief that items omitted from his list of liabilities were not valid charges or were contingent claims.<sup>893</sup>

It is the duty of a merchant who has furnished statements to commercial agencies of his financial standing for the purpose of gaining credit, to give them notice of any material change for the worse, to the end that persons with whom he has business dealings may not be misled as to the extent of credit they may safely give him,<sup>894</sup> and the failure to do so will be presumptive evidence (but not conclusive) of an intent to obtain goods without paying for them.<sup>895</sup> At the same time, it must be remarked that the seller is not exempt from a certain

<sup>890</sup> *Cohn v. Broadhead*, 51 Neb. 834, 71 N. W. 747. That statements of opinion are generally not equivalent to assertions of fact, see, *supra*, § 76. For the conditions under which assertions of value are regarded as merely expressions of opinion, see, *supra*, § 79.

<sup>891</sup> *In re Roalswick* (D. C.) 110 Fed. 639; *Kirschbaum v. Jasspon*, 123 Mich. 314, 82 N. W. 69; *Jaffray v. Moss*, 41 La. Ann. 548, 6 South. 520.

<sup>892</sup> *Hamburger v. Lusky* (Tenn. Ch. App.) 56 S. W. 24.

<sup>893</sup> *Tennent Shoe Co. v. Stovall*, 25 Ky. Law Rep. 1615, 78 S. W. 417; *Arnold v. Richardson*, 74 App. Div. 581, 77 N. Y. Supp. 763; *Bradley v. Seaboard Nat. Bank*, 167 N. Y. 427, 60 N. E. 771.

<sup>894</sup> *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425.

<sup>895</sup> *Boaz v. Coulter Mfg. Co.* (Tex. Civ. App.) 40 S. W. 866.



duty of care and prudence. Business conditions change rapidly, and he is not justified in relying implicitly on an old or stale report,<sup>396</sup> and it is a question for the court whether the report in question was sufficiently near the time of the transaction in suit to be admissible in evidence.<sup>397</sup> Further, to entitle a plaintiff to rescission or other relief, he must show that he entered into the contract in question in reliance on the report made to or by the commercial agency,<sup>398</sup> and not upon independent or outside information or upon facts otherwise coming to his knowledge, or upon his own judgment as to the financial condition of the other party.<sup>399</sup> And again, a note of warning may be sounded by the comments made by the agency in giving a report on a person's credit or finances, or by suspicious or surprising items in the statement, or even by outside facts coming to the party's knowledge. In such cases, he is put upon inquiry and is chargeable with knowledge of such facts as an inquiry would have disclosed.<sup>400</sup> But it is said that one relying upon the rating given by a commercial agency is not bound to examine the detailed statement made to the agency by the person rated, to protect himself against fraudulent misrepresentations therein.<sup>401</sup> But on the other hand, it is ruled in Nebraska that a sale of goods made on the faith of the entire report of a commercial agency as to the financial standing of the proposed buyer, and not particularly in reliance on any single statement made by him to the agency, cannot be rescinded because such single statement was false.<sup>402</sup>

<sup>396</sup> *Bentley v. Woolson Spice Co.*, 1 Neb. (Unof.) 558, 95 N. W. 803.

<sup>397</sup> *Nicholls v. McShane*, 16 Colo. App. 165, 64 Pac. 375.

<sup>398</sup> *Beacon Falls Rubber Shoe Co. v. Pratte*, 190 Mass. 72, 76 N. E. 285; *Ernst v. Cohn* (Tenn. Ch. App.) 62 S. W. 186.

<sup>399</sup> *Richardson-Roberts-Byrne Dry-Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. 1079.

<sup>400</sup> *In re Epstein* (D. C.) 109 Fed. 874; *Beacon Falls Rubber Shoe Co. v. Pratte*, 190 Mass. 72, 76 N. E. 285.

<sup>401</sup> *Aultman, Miller & Co. v. Carr*, 16 Tex. Civ. App. 430, 42 S. W. 614.

<sup>402</sup> *Poska v. Stearns*, 56 Neb. 541, 76 N. W. 1078, 42 L. R. A. 427, 71 Am. St. Rep. 688; *Berkson v. Heldman*, 58 Neb. 595, 79 N. W. 162.

§ 98. **Representations as to Financial Ability.**—Misrepresentations as to his financial ability or resources, made by one of the parties to any contract, for the purpose of persuading or reassuring the other as to his ability to perform his part of it or discharge the pecuniary obligations which it imposes, may constitute such fraud as will justify rescission. Thus, for example, a sale of goods on credit may be rescinded and the goods reclaimed, when the buyer knowingly made false representations in regard to his solvency, the amount of his property and debts, or other details of his financial condition, for the purpose of obtaining credit, and the seller was thereby induced to make the sale.<sup>403</sup> And this rule applies irrespective of the buyer's intention with respect to paying for the goods, that is, it is not necessary for the defrauded vendor to show that the purchaser did not mean to pay for the property, and even though he actually intended to pay, it is no defense against a charge of fraud founded on material false representations of this character.<sup>404</sup> For the same

<sup>403</sup> *In re Marengo County Mercantile Co.* (D. C.) 199 Fed. 474; *McKenzie v. Weineman*, 116 Ala. 194, 22 South. 508; *Bell v. Kaufman*, 9 Colo. App. 259, 47 Pac. 1035; *Freeman v. Topkis*, 1 Marv. (Del.) 174, 40 Atl. 948; *Hughes v. Winship Mach. Co.*, 78 Ga. 793, 4 S. E. 6; *P. Cox Shoe Mfg. Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Buffington v. Gerrish*, 15 Mass. 156, 8 Am. Dec. 97; *Wiggin v. Day*, 9 Gray (Mass.) 97; *Clark v. William Munroe Co.*, 127 Mich. 300, 86 N. W. 816; *Krolík v. Lang* (Mich.) 153 N. W. 686; *Werthelmer-Swarts Shoe Co. v. Exchange Bank of Springfield*, 56 Mo. App. 662; *Burnham v. Jacobs*, 66 Mo. App. 628; *Omaha Feed Co. v. Rushforth*, 75 Neb. 340, 106 N. W. 25; *First Nat. Bank v. McKinney*, 47 Neb. 149, 66 N. W. 280; *Sheffield v. Mitchell*, 31 App. Div. 266, 52 N. Y. Supp. 925; *Richardson v. Vick*, 125 Tenn. 532, 145 S. W. 174; *Werthelmer-Swartz Shoe Co. v. Faris* (Tenn. Ch. App.) 46 S. W. 336; *B. F. Avery & Sons v. Dickson* (Tex. Civ. App.) 49 S. W. 662.

<sup>404</sup> *Bugg v. Werthelmer-Schwartz Shoe Co.*, 64 Ark. 12, 40 S. W. 134; *Stephenson v. Weathersby*, 65 Ark. 631, 45 S. W. 987; *Morris v. Posner*, 111 Iowa, 335, 82 N. W. 755; *Moore v. Hinsdale*, 77 Mo. App. 217; *Kirschbaum v. Jasspon*, 123 Mich. 314, 82 N. W. 69; *Richardson-Roberts-Byrne Dry-Goods Co. v. Goodkind*, 22 Mont. 462, 56 Pac. 1079. But the fact that a buyer of 100 bales of cotton falsely represented himself to be worth a million dollars does not justify the seller in rescinding the contract of sale, unless the buyer is unable to make the purchase at the proper time. *Baker v. Lehman, Weil & Co.*, 186 Ala. 493, 65 South. 321.

reason, one who is induced to subscribe for stock in a corporation, or to accept its stock in exchange for property, by the false and fraudulent representations of its officers concerning its financial condition, resources, indebtedness, or property, will be entitled to rescission;<sup>405</sup> and the same relief may be accorded to one who sells his stock in a corporation for less than its value, to one who is engaged in the management of the company, being induced to do so by the latter's fraudulent representations as to the financial condition of the corporation.<sup>406</sup> The same rule applies to many other classes of transactions, as, for instance, to a sale and conveyance of land effected by means of the buyer's false statements concerning his financial resources,<sup>407</sup> to a lease obtained by the tenant by similar means and which the lessor would not have granted if he had known the real condition of the lessee,<sup>408</sup> to an exchange of property for an interest in a partnership represented as being solvent and prosperous, but in reality insolvent,<sup>409</sup> and to an indorsement of a note, procured by false representations as to the financial ability of the maker.<sup>410</sup>

Misrepresentations of this kind may be made by the direct and positive assertion of financial resources, as, where the party asserts that a certain man of known standing is his partner and has contributed a given amount of capital,<sup>411</sup> that he is amply able to pay a certain judgment against him, whereby he induces another to become sure-

<sup>405</sup> *Newbegin v. Newton Nat. Bank*, 66 Fed. 701, 14 C. C. A. 71; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *McElwee v. Chandler*, 198 Pa. 575, 48 Atl. 475; *Iler v. Jennings*, 87 S. C. 87, 68 S. E. 1041; *Robinson v. Dickey*, 14 Tex. Civ. App. 70, 36 S. W. 499; *Simons v. Clissna*, 52 Wash. 115, 100 Pac. 200; *McClellan v. Scott*, 24 Wis. 81. See *Gains v. Massey*, 190 Mo. App. 199, 176 S. W. 427.

<sup>406</sup> *Hume v. Steele* (Tex. Civ. App.) 59 S. W. 812.

<sup>407</sup> *Franklin v. Walker*, 171 Ill. 405, 49 N. E. 556; *Hinchey v. Starrett*, 91 Kan. 181, 137 Pac. 81.

<sup>408</sup> *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529.

<sup>409</sup> *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663.

<sup>410</sup> *Hubbert v. State* (Tex. Cr. App.) 147 S. W. 267.

<sup>411</sup> *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. 346.

ty on an appeal bond,<sup>412</sup> or where a corporation makes false statements in its annual statement of its financial condition.<sup>413</sup> And so, where a vendee in negotiating a purchase of goods, makes designedly false answers to questions put to him by the vendor concerning his means and what he had bought or was intending to buy from others, and thereby obtains credit, the vendor may rescind.<sup>414</sup> But concealment may be a fraudulent representation, as well as a positive statement. Hence a fraud of this kind is perpetrated when one fraudulently conceals or omits to mention specific debts which he owes,<sup>415</sup> at least if they are large enough to impair his solvency.<sup>416</sup> And a corporation to which partners convey property, it agreeing as part of the consideration to pay all their indebtedness, is entitled to relief against them for damages sustained by it through their misrepresentation as to the amount of the indebtedness.<sup>417</sup>

To warrant rescission on the ground of misrepresentations as to financial ability, it is necessary that they should have been relied on and that they should have constituted the inducement to make the sale or enter into the contract,<sup>418</sup> and also that they should have been specific and definite, not loose or vague general assertions.<sup>419</sup> Thus, for instance, a statement of the buyer that the seller may draw on him for the amount which the latter has to pay in purchasing the goods, and that, as soon as the buyer has received them, he will pay the balance, is not a representation that the buyer is solvent.<sup>420</sup> And also it must be shown

<sup>412</sup> *Dickinson v. Atkins*, 100 Ill. App. 401.

<sup>413</sup> *Hamilton-Brown Shoe Co. v. Milliken*, 62 Neb. 116, 86 N. W. 913.

<sup>414</sup> *Huthmacher v. Lowman*, 66 Ill. App. 448.

<sup>415</sup> *William Openhym & Sons v. Blake*, 157 Fed. 536, 87 C. C. A. 122; *Parlin & Orendorff Co. v. Glover*, 45 Tex. Civ. App. 93, 99 S. W. 592; *Ellet-Kendall Shoe Co. v. Martin*, 222 Fed. 851, 138 C. C. A. 277.

<sup>416</sup> *Noble v. Worthy*, 1 Ind. T. 458, 45 S. W. 137.

<sup>417</sup> *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955.

<sup>418</sup> *Roscoe v. Sawyer*, 71 Vt. 367, 45 Atl. 218.

<sup>419</sup> *Fulton v. Giblan*, 98 Ga. 224, 25 S. E. 431; *Slayden-Kirksey Woolen Mills v. Weber*, 46 Tex. Civ. App. 433, 102 S. W. 471.

<sup>420</sup> *Skinner v. Michigan Hoop Co.*, 119 Mich. 467, 78 N. W. 547, 75 Am. St. Rep. 418.

that the representations were false, not technically so, but substantially so, and to such an extent as to prejudice or injure the other party.<sup>421</sup> But these conditions being met, the responsibility of the person making the representations is the same whether he made them carelessly or with a fraudulent purpose, whether he knew them to be false or believed them to be true; for every person is presumed to know his own financial condition, at least to the extent of a close approximation, and is bound to state it truthfully if he states it at all, and one dealing with him is entitled to rely on his representations.<sup>422</sup>

But it is necessary to distinguish carefully between a positive assertion of fact and the expression of a mere opinion; and a statement by a person as to his own financial condition may be the one or the other, according to the circumstances. "Such a representation may be intended as a willfully false statement of a fact, and may be understood as a statement of fact. Or it may be intended as the expression of the opinion or estimate which the owner has of the value of his property, and may be so understood. Suppose that a man who owns property worth \$1,000, for the purpose of procuring credit, represents that he has property worth \$100,000. It would be self-evident that he meant to misrepresent facts, and such misrepresentation would be fraud. But if the same man should represent that he had property worth \$1,500, it might well be regarded as an expression of his judgment or estimate of value, and therefore not an actionable fraud. In such cases it is for the jury to determine."<sup>423</sup> Hence, where a statement by a purchaser of his pecuniary standing is not so grossly excessive as to imply a fraudulent intent, and no such intent is directly proved, the estimate is re-

<sup>421</sup> *Blackman v. Wright*, 96 Iowa, 541, 65 N. W. 843; *Standard Horseshoe Co. v. O'Brien*, 88 Md. 335, 41 Atl. 898.

<sup>422</sup> *George D. Mashburn & Co. v. Dannenberg Co.*, 117 Ga. 567, 44 S. E. 97; *Fitchard v. Doheny*, 93 App. Div. 9, 86 N. Y. Supp. 964; *Katzenstein v. Reid*, 41 Tex. Civ. App. 106, 91 S. W. 360; *Galipolis Furniture Co. v. Symmes*, 10 O. C. D. 514, 10 Ohio Cir. Ct. R. 659; *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529.

<sup>423</sup> *Morse v. Shaw*, 124 Mass. 59. And see *Phillips v. Hebden*, 28 R. I. 1, 65 Atl. 266; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 447, 43 Atl. 637.

garded as an expression of opinion, and not ground for rescinding the sale.<sup>424</sup> So, representations by a vendee that he "is in good shape financially, expects to discount all his bills, and carries a stock of \$20,000," amount merely to statements of opinion, judgment, or expectation, and a vendor who has relied upon them to his loss cannot base a charge of fraud upon them.<sup>425</sup> And a sale of goods is not shown to have been induced by false representations, so as to allow of rescission, the purchaser having merely stated that he was worth more money than when he made a financial statement eight months before, showing assets of \$136,000 and liabilities of \$84,000, merely because when, two months afterwards, he confessed judgments, the sale of his property on execution did not bring enough to pay his debts.<sup>426</sup>

**§ 99. Representations as to Financial Standing of Third Persons.**—A statement as to the solvency or financial responsibility of a third person is generally an expression of opinion merely, and not a representation of a fact.<sup>427</sup> No one can be compelled to respond when applied to for information of this kind, but he must give his honest opinion if he speaks at all, and is not allowed to indulge in that measure of "puffing" or exaggerated praise which is considered pardonable in the seller of an article.<sup>428</sup> And the general rule is that one who is applied to for information concerning the solvency, financial responsibility, or resources of a third person, and who recommends him as entitled to credit, is held responsible only for the honesty of his opinion, not for its correctness, so that, if he states no more than what he sincerely believes, he is not liable in an action for fraud or deceit, although the person recommended proves to be insolvent or worthless.<sup>429</sup> On the other hand, one who thus

<sup>424</sup> *White v. Fitch*, 19 R. I. 687, 36 Atl. 425.

<sup>425</sup> *William B. Grimes Dry-Goods Co. v. Jordan*, 7 Kan. App. 192, 53 Pac. 186.

<sup>426</sup> *Greene v. Fondersmith*, 200 Pa. 625, 50 Atl. 209.

<sup>427</sup> *Belcher v. Costello*, 122 Mass. 189.

<sup>428</sup> *Moses Loeb & Co. v. Godchaux*, 2 McGloin (La.) 140; *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498.

<sup>429</sup> *Tryon v. Whitmarsh*, 1 Metc. (Mass.) 1, 35 Am. Dec. 339; *Pearson v. Howe*, 1 Allen (Mass.) 207; *Duff v. Williams*, 85 Pa. 490;

procures credit for another is guilty of a fraud if he knows, at the time, that the person recommended is insolvent or not trustworthy, so that his expressed opinion is deceptive and not honestly entertained, and he may therefore be held answerable for the ensuing loss.<sup>430</sup> Thus, an action lies for fraudulently recommending an insolvent person, whereby he was enabled to procure goods from the plaintiff, which the defendant immediately attached, and which were thereby lost to the plaintiff.<sup>431</sup> And if a statement as to the financial condition of a third person is made, not as a general expression of opinion upon his solvency or credit, but as the direct assertion of a specific fact, the person making it is bound to know its truth and is answerable accordingly. Thus, where plaintiff relied upon defendant's positive statement in a letter of credit that a person was worth \$3,000 above his liabilities, defendant is liable if the statement was false, even though he believed it to be true.<sup>432</sup>

In all such cases, therefore, an intent to deceive must be established, or else the reckless assertion of an unfounded opinion. "Generally it may be said that, in order to uphold an action for fraud in misrepresenting the pecuniary condition of another, an intent to deceive must be established, and this intent must be established by other evidence than the mere falsity of the statement. Thus, it must be shown that the circumstances of the party were such, or that his relations with the party making the representations were such, that knowledge of his insolvency on the part of the person making the representations can fairly be

Slade v. Little, 20 Ga. 371; Albion Milling Co. v. First Nat. Bank, 64 Neb. 116, 89 N. W. 638; Moses Loeb & Co. v. Godchaux, 2 McGloin (La.) 140; Bretzfelder, Bronner & Co. v. Waddle, 122 Mo. App. 462, 99 S. W. 806; Bartles v. Courtney, 6 Ind. T. 379, 98 S. W. 133. But see Wells v. Driskell (Tex. Civ. App.) 149 S. W. 205, holding that an action for deceit will lie if defendant made representations inducing plaintiff to extend credit to an irresponsible person without knowing whether they were true or not.

<sup>430</sup> Lang v. Lee, 3 Rand. (Va.) 410; Bean v. Renway, 17 How. Prac. (N. Y.) 90; Simons v. Clsna, 52 Wash. 115, 100 Pac. 200; Gibbens v. Bourland (Tex. Civ. App.) 145 S. W. 274.

<sup>431</sup> Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Tryon v. Whitmarsh, 1 Metc. (Mass.) 1, 35 Am. Dec. 339.

<sup>432</sup> Mendenhall v. Stewart, 18 Ind. App. 262, 47 N. E. 943.



inferred, or that the circumstances indicate that he intended the party to believe that he spoke from actual knowledge, when in fact he had none. So too, it is important to ascertain whether the representation was a mere expression of an opinion, and whether that opinion was honestly entertained, for if it was made in good faith, however erroneous, or however much damage ensues therefrom, no liability attaches therefor. In order to show the honesty of his representations, it is always competent to show that other persons acquainted with the person in reference to whose solvency the representations were made, entertained a similar opinion.”<sup>488</sup> A sound exposition of this point has been given by the Supreme Court of Ohio, as follows: “This request (for instructions) is based upon the idea that, where a party simply believes in the truth of a representation made by him upon which another parts with his property or rights, he will not be guilty of fraud or gross negligence. This doctrine appears to be sound where the question of the credit of the party recommended is involved, and nothing more. Such recommendations are generally understood to be nothing more than the opinion of those who give them, resting upon common reputation, and the apparent circumstances of the individual recommended, and not upon any examination of his affairs. And it is well known that men who are apparently in good circumstances and credit turn out to be in reality insolvent. In such cases, a recommendation of that kind should not be presumed fraudulent because it happens not to be true. But the rule is otherwise where the false representation induces the contract between the parties thereto and enters into it. It is otherwise where the party making the false representations is bound to know the truth of his representations; then mere belief in their truth will not excuse. One is responsible for his belief in cases where a prudent person might know the truth of the facts upon which his supposed belief is founded. \* \* \* Where a party, from the nature of the transaction and his relation to the parties and the facts are such that he is chargeable with a knowledge of

<sup>488</sup> 2 Add. Torts (Wood's edn.) § 1186, note.

the truth of the representations he makes, if they are false, he cannot escape liability by saying he believed them to be true. It was his duty to know whether they were true, and his belief will not excuse him from liability to the person injured thereby, unless the facts will reasonably justify a prudent man in such belief."<sup>484</sup> Of course it is further necessary to sustain an action that statements made in relation to a third person should have a direct bearing on the particular question of his solvency or credit, and that they should have induced the plaintiff to act and should have been relied on by him.<sup>485</sup>

The foregoing rules and principles apply where the person making the representations or recommendation has no interest or concern in the ensuing contract, which takes place between the person to whom the representations are made and the third person to whom they relate. If the party inquired of stands aloof from the transaction, it is only fair, as above stated, to hold him responsible only for the honesty of his expressed opinion, not for its correctness. But the case is different where he is a party to the contract and his representations are made for the purpose of influencing or persuading the other party to the contract, so that his self-interest enters into the question. Here he is responsible for the truth of what he states, and not simply for his belief in it. And in this case assertions concerning the financial condition of a third person are regarded as representations of fact, not as expressions of opinion, unless, perhaps, the party will guard himself, at the time, by explicitly declaring that what he says is only his opinion or belief. Thus, for example, where one of the parties to a sale or exchange induces the other to accept a promissory note made by a third person in payment of the consideration, his representation that the note is good and that the maker is solvent and able to pay it is not a mere commendation of quality, nor the expression of an opinion, but is a positive assertion of fact, and its falsity will justify

<sup>484</sup> *Parmlee v. Adolph*, 28 Ohio St. 10.

<sup>485</sup> *Liggett v. Levy*, 233 Mo. 590, 136 S. W. 299, Ann. Cas. 1912C, 70; *McClure v. Campbell*, 148 Mo. 96, 49 S. W. 881; *Potts v. Chapin*, 133 Mass. 276.

the rescission of the contract.<sup>486</sup> Of course the same rule applies to other similar cases, as, where one buys a judgment against a third person on the seller's representation that the debtor is solvent and responsible,<sup>487</sup> or where one is induced to exchange a farm for a worthless interest in an insolvent firm, in reliance on representations that it is solvent and prosperous.<sup>488</sup> So where a seller makes an affirmative statement as to the financial condition of a corporation, and stock therein is bought on the faith of it, the absence of any scienter on the part of the seller does not affect the purchaser's right to recover as for breach of warranty.<sup>489</sup> In a case before the Supreme Court of the United States, the plaintiffs alleged that they made a contract by which the defendant was to deliver to them a certain number of cattle; that subsequently the defendant induced them to accept an assignment of a contract in his favor by another person to deliver the cattle; that thereupon the plaintiffs paid the defendant \$15,000, which he had paid to such third party, gave him their obligation to pay him a sum which represented his profit on the sale to them, and returned to him the original contract with him; that they were induced to accept such assignment, pay such sum, and to give the obligation, by the false and fraudulent representations of the defendant as to such third party's solvency and business standing; and they prayed for a discovery, for the rescission and cancellation of the assignment and of the plaintiff's obligation, and for a reinstatement and confirmation of the original contract, and its enforcement, or, if that could not be done, that the defendant be compelled to repay the \$15,000 and to pay the damages sustained. It was held that the bill stated a case for which an action of deceit could be maintained at law, but because that would afford

<sup>486</sup> *Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149; *Sears v. Smith*, 2 Mich. 243; *Scovill v. Wait*, 54 N. Y. 650; *Ganow v. Ashton*, 32 S. D. 458, 143 N. W. 383; *Ingram v. Abbott*, 14 Tex. Civ. App. 583, 38 S. W. 626; *Corey v. Boynton*, 82 Vt. 257, 72 Atl. 987; *Hollenback v. Shoyer*, 16 Wis. 499.

<sup>487</sup> *Caldwell v. Caldwell*, 1 J. J. Marsh. (Ky.) 53.

<sup>488</sup> *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663.

<sup>489</sup> *Iler v. Jennings*, 87 S. C. 87, 68 S. E. 1041.

an adequate and complete remedy, a court of equity had no jurisdiction to entertain the suit.<sup>440</sup>

§ 100. **Falsity of Representations.**—To justify the rescission of a contract or its cancellation on the ground of fraudulent representations, it is absolutely essential to show that the alleged representations were false in fact, for this is one of the indispensable elements of a fraud, and it cannot be established without proving this fact.<sup>441</sup> And the proof of this point must be full and convincing. A mere suspicion that a transaction was induced by false representations will not justify a court of equity in setting it aside, but their falsity must be certainly proved by evidence which leaves an abiding conviction in the mind.<sup>442</sup> Hence, whatever fraudulent purpose the defendant may have entertained, and although he did not know the truth of the matter of which he spoke, and even although he actually believed that the representations which he made were false, yet this kind of relief cannot be granted if they turn out to have been true after all.<sup>443</sup> Moreover, to make a “false representation,” it is not sufficient that the statement made should be technically or literally false, if it is substantially true.<sup>444</sup> For instance, a statement by a corporation that its “capital” amounts to a certain sum may be technically

<sup>440</sup> *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451.

<sup>441</sup> *Varley Duplex Magnet Co. v. Osthelmer*, 159 Fed. 655, 86 C. C. A. 523; *Belden v. Henriques*, 8 Cal. 87; *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182; *Hart v. Waldo*, 117 Ga. 590, 43 S. E. 998; *Marietta Fertilizer Co. v. Beckwith*, 4 Ga. App. 245, 61 S. E. 149; *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252; *Wesselhoeft v. Schanze*, 153 Ill. App. 443; *Long's Ex'r v. Owen*, 30 Ky. Law Rep. 495, 98 S. W. 1010; *Atlas Shoe Co. v. Bechard*, 102 Me. 197, 66 Atl. 390, 10 L. R. A. (N. S.) 245; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *Hampton v. Webster*, 56 Neb. 628, 77 N. W. 50; *Scarsdale Pub. Co. v. Carter*, 63 Misc. Rep. 271, 116 N. Y. Supp. 731; *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313; *Deppen v. Light*, 228 Pa. 79, 77 Atl. 247; *Konikow v. Reiseroff* (R. I.) 82 Atl. 785; *Mach. Mfg. Co. v. Donovan*, 86 N. J. Law, 327, 91 Atl. 310.

<sup>442</sup> *Eureka Dairy Co. v. McSween*, 37 App. D. C. 1.

<sup>443</sup> *Hart v. Waldo*, 117 Ga. 590, 43 S. E. 998; *Fox v. State*, 102 Ark. 451, 145 S. W. 228.

<sup>444</sup> *Kimber v. Young*, 157 Fed. 199, 84 C. C. A. 647.

false if the capital with which it began business is materially less than the sum stated, but substantially true if it be the fact that the corporation holds undivided profits, enough to make up the difference, which it uses in its business as capital.<sup>445</sup> So, a representation by the seller of a business that a lease covering the premises is a "four year straight lease" is not actionable as fraudulent because it appears that the lessor had reserved the right to terminate the lease on five days' notice for violation of any covenant by the lessee.<sup>446</sup> In another case, it appeared that plaintiff had contracted to purchase a large number of bicycles from a corporation engaged in their manufacture, the same to be shipped subject to plaintiff's orders. He gave notes for certain invoices of bicycles, not shipped, in reliance on a representation that they had been completed and set apart as his property. This was not literally true, but it was shown (in an action to cancel the notes) that the frames had been set apart, and that other parts were kept on hand, so that they could be quickly assembled, and that the bicycles could not be put together until instructions had been received from the plaintiff as to tires and sprocket wheels. It was held that the representation was not so substantially false as to constitute a legal fraud.<sup>447</sup> So a statement that the charter of a corporation is perpetual is not shown to be false in the legal sense where it appears that the statement was made in reliance on a decision of a court of the state, though the point is afterwards drawn in question on an appeal.<sup>448</sup> Again, a representation that defendant's son had a clear annual income of a certain amount from his father's estate, which was his own without restriction, was held not falsified by the fact that the will provided that the income should not be liable for the son's debts.<sup>449</sup> But on the other hand, a representation that a certain lease was

<sup>445</sup> *Bradley v. Seaboard Nat. Bank*, 46 App. Div. 550, 62 N. Y. Supp. 51. (See this case on appeal, 167 N. Y. 427, 60 N. E. 771.)

<sup>446</sup> *Goldman v. Kleinhenz* (Sup.) 129 N. Y. Supp. 374.

<sup>447</sup> *World Mfg. Co. v. Hamilton-Kenwood Cycle Co.*, 123 Mich. 620, 82 N. W. 528.

<sup>448</sup> *Donnelly v. Baltimore Trust & Guarantee Co.*, 102 Md. 1, 61 Atl. 301.

<sup>449</sup> *Gleason v. Thaw*, 205 Fed. 505, 123 C. C. A. 573.

perpetual was held false in fact where it appeared that the lease ran for ninety-nine years.<sup>450</sup> And so, where the seller of mining stock represented that the stock offered was treasury stock and that the money paid for it would go to the development of the property, but in fact sold stock which he owned himself, it was held that the buyer was entitled to rescind.<sup>451</sup>

In the next place, a statement may be composite and may be partly true and partly false. In this case, if the untrue part of the statement is trifling or unimportant, and cannot be supposed to have had any influence on the mind of the contracting party, it will not make the representation a fraud in its entirety. But if the false part of the statement is material, so that the party would not have agreed to the contract if he had known the truth, this will be sufficient to vitiate it.<sup>452</sup> For example, where the owner of a patent right exhibits a model, and states that the patent which he owns covers the machine exhibited, and on the strength of that representation sells the right to manufacture it, the contract may be rescinded if an important device shown in the model is covered by another patent, and the purchaser cannot, for that reason, manufacture under the right the machine shown to him.<sup>453</sup> Again, it may happen that parts of a statement are false, but are contradicted or set right by other parts. Here it is necessary to consider the statement as an entirety. Thus, where a person invited to subscribe for stock in a corporation is handed several documents, which he reads, and one of them contains statements which are false or at least misleading, but the others contradict, explain, or limit these statements so as to show the ultimate truth, he cannot repudiate his subscription on the ground of having been deceived by the false statements, though he also alleges that he did not notice or understand the corrections or explanations; for he ought to have done

<sup>450</sup> *Edwards v. Noel*, 88 Mo. App. 434.

<sup>451</sup> *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162.

<sup>452</sup> *Hasse v. Freud*, 119 Mich. 358, 78 N. W. 131; *Jesse French Piano & Organ Co. v. Garza*, 53 Tex. Civ. App. 346, 116 S. W. 150.

<sup>453</sup> *Moyle v. Silbaugh*, 105 Iowa, 531, 75 N. W. 362.

so.<sup>454</sup> But it may be that this rule should not be applied too inflexibly. If the correcting or modifying statements are printed in small type, with the evident hope that they may escape notice, it has been considered such evidence of a fraudulent purpose as to warrant repudiation of the contract.<sup>455</sup> Finally, we have to consider the case where representations were false at the time they were made, but become true by the course of events, or are made good by the voluntary action of the party, before the person claiming to have been defrauded parts with his money or otherwise changes his situation. It is generally held that such a case does not warrant rescission or the granting of equivalent relief.<sup>456</sup> The theory appears to be, not so much that the original fraud is condoned or wiped out, as that the party claiming to have been defrauded has suffered no injury and has nothing to complain of, for he entered into his contract on the assumption of a state of facts which, however it may have been originally, has now become a reality. But the change of affairs must be such as to make the original representations become wholly and entirely true. There is ground for rescission if they remain false in any material particular, though corrected in others.<sup>457</sup>

§ 101. **Ambiguous and Misleading Statements.**—If a statement made to induce another to enter into a contract is literally true, but is presented in such a light or aspect as to create a false impression, or if a statement, taken as a whole, is designedly deceptive and misleading, though each of its details may be true, in either case it is as much a fraudulent misrepresentation as a known falsehood deliberately asserted.<sup>458</sup> In other words, a false representation

<sup>454</sup> *Scholey v. Central Ry. Co. of Venezuela*, L. R. 9 Eq. 266, note.

<sup>455</sup> *Cunningham v. Morris*, 56 Wash. 341, 105 Pac. 839.

<sup>456</sup> *Ship v. Crosskill*, L. R. 10 Eq. 73; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392; *Adams v. Hill* (Tex. Civ. App.) 149 S. W. 349. But see, contra, *Davis v. Scher*, 73 N. J. Law, 155, 62 Atl. 193; *Lehman-Charley v. Bartlett*, 135 App. Div. 674, 120 N. Y. Supp. 501.

<sup>457</sup> *Hamilton v. American Hulled Bean Co.*, 156 Mich. 609, 121 N. W. 731.

<sup>458</sup> *Match v. Hunt*, 38 Mich. 1; *Marietta Fertilizer Co. v. Beck-*



may be made by presenting that which is true so as to create an impression which is false, and then profiting by the false impression thus created.<sup>459</sup> "To constitute a fraudulent representation, it need not be made in terms expressly stating the existence of some untrue fact, but if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms."<sup>460</sup> For instance, if the facts set forth in a company's prospectus are so combined or manipulated as to create a certain impression in the mind of a reader, which impression is false and is fraudulently intended to be deceptive, one who is induced to subscribe for stock on the basis of the prospectus will be entitled to rescind his contract, although no one statement in the document, taken by itself, is untrue.<sup>461</sup> To take another illustration, one selling stock represented to the purchaser that the last dividend declared by the company was a semi-annual dividend of seven per cent. and that the fiscal year of the company ended June 1st. This was true. But the inference naturally drawn by the purchaser was that the dividend spoken of had been declared in June of the current year, whereas it really had been declared two years before and the company was insolvent at the time of the sale. This, with other misrepresentations as to the prosperous condition of the company, was held fraud sufficient to avoid the sale.<sup>462</sup>

Again, if one is under a duty to disclose facts in his possession or volunteers to do so, he must make a full and fair disclosure. And although that which he states is perfectly true, yet if it constitutes only a part of the truth, that which

with, 4 Ga. App. 245, 61 S. E. 149; *Melick v. Metropolitan Life Ins. Co.*, 84 N. J. Law, 437, 87 Atl. 75; *Jones v. Commercial Travelers' Mut. Accident Ass'n*, 134 App. Div. 936, 118 N. Y. Supp. 1116; *Lehman-Charley v. Bartlett*, 135 App. Div. 674, 120 N. Y. Supp. 501.

<sup>459</sup> *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

<sup>460</sup> *Lee v. Jones*, 17 C. B., N. S., 482, 510.

<sup>461</sup> *Aaron's Reefs v. Twiss* [1896] A. C. 273.

<sup>462</sup> *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

is damaging being kept back or concealed, so that the partial truth stated creates a deceptive and misleading impression, which would not have entered the mind of the other party if the whole truth had been disclosed to him, this is also a case of fraudulent misrepresentation.<sup>463</sup> In an English case, where the plaintiff had been induced to subscribe for stock in a company on the faith of its prospectus, the court remarked: "It is said that everything which is stated in the prospectus is literally true, and so it is. But the objection to it is not that it does not state the truth, as far as it goes, but that it conceals most material facts with which the public ought to have been made acquainted, the very concealment of which gives to the truth which is told the character of a falsehood."<sup>464</sup> But on the other hand, if the essential facts are truthfully stated, the party so stating them is not responsible for the incorrectness of the conclusions from the facts which the other party draws by false reasoning or mistaken calculations.<sup>465</sup> And again, allowance must be made for the case where one misleading statement may counteract or balance another. Thus, a published report of the financial condition of a bank, in which the resources and the liabilities are equally inflated, is not such a material misrepresentation as will support an action for deceit, unless by such report the condition of the bank is made to appear better than it actually is.<sup>466</sup> So again, the customs of a particular trade or business may sanction the employment of terms in a sense which would convey a different meaning to the uninitiated. Thus, a statement that the present mileage of a railroad company amounts to a certain number of miles is not fraudulent by reason of the fact that such mileage is obtained by counting each mile of double track as two miles, in accordance with recognized custom.<sup>467</sup>

<sup>463</sup> *Kenyon v. Woodruff*, 33 Mich. 310; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399; *Gidney v. Chapple*, 26 Okl. 737, 110 Pac. 1099.

<sup>464</sup> *Oakes v. Turquand*, L. R. 2 H. L. 325.

<sup>465</sup> *Bowman v. Bates*, 2 Bibb (Ky.) 47, 4 Am. Dec. 677.

<sup>466</sup> *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596.

<sup>467</sup> *Donnelly v. Baltimore Trust & Guarantee Co.*, 102 Md. 1, 61 Atl. 301.

When the alleged misrepresentations are in writing and relate to a matter collateral to the contract (that is, not to its terms or meaning, but to a matter of inducement), it is said that the words should not be construed too loosely, nor given too wide a meaning, so as to make them fraudulent, but all doubts should be resolved in favor of good faith.<sup>468</sup> But if a statement by which a plaintiff says he was deceived is ambiguous, the plaintiff is bound to state the meaning which he attached to it and the sense in which he understood it, in order to show its falsity and materiality and that it induced him to enter into the contract, and he cannot leave it to the court to put a meaning upon the statement.<sup>469</sup> In this case it is also open to the defendant to explain his language so as to make it comport with the truth. Thus, in an action of deceit founded on alleged false representations contained in a letter, "of course one will be presumed to have intended his language to be understood according to its usual meaning, and in ordinary cases, in the absence of a reasonable explanation of his mistake, his testimony that he meant something different from what he said will have but little if any weight. But inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates. In this respect, his expressions, whether spoken or written, are not dealt with in the same way as when the question is what contract has been made between two persons who were mutually relying upon the language used in their agreement."<sup>470</sup>

When the allegation is of fraudulently misrepresenting the purport or meaning of the contract itself, the rule is not quite the same. It is said that parties are bound by their contracts which are free from ambiguity and are susceptible

<sup>468</sup> *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47.

<sup>469</sup> *Smith v. Chadwick*, L. R. 20 Ch. Div. 27.

<sup>470</sup> *Nash v. Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489.

of construction by the court without the aid of facts.<sup>471</sup> And where no other means are employed to induce a person to accept a proposition for a contract than the language contained in a writing, he cannot be heard to say that, because of his inaptness in comprehending on examination the ordinary import and common acceptation of the terms employed, they must be made to mean more or other than what they express.<sup>472</sup> And the fraudulent representations of a seller as to the meaning of certain terms in the printed contract of sale which he is endeavoring to induce the buyer to sign are not representations of existing material facts which would constitute an inducement on which the buyer has a right to rely.<sup>473</sup> On the other hand, in a case in Michigan, it is held that, where one party to a contract misleads and deceives the other as to its purport or the purpose for which it is made, he is responsible for the understanding which his representations and statements do actually raise in the mind of the other party and which he intends they should raise, though his words, if taken literally, would not create that impression. No one, it was said, can evade the force of the impression which he knows another received from his words and conduct, and which he meant him to receive, by resorting to the literal meaning of his language alone. "It may be that defendants, by a careful use of language, evaded expressing in words the agreement they meant complainant to understand they were making. But this is a species of cunning which amounts to nothing. Their whole conduct, and the impression it was designed to make, must determine their position."<sup>474</sup>

**§ 102. Knowledge of Falsity of Representations.—**When false representations are set up as a cause of action or defense in a suit at law, it is not sufficient merely to show their falsity, but it must also be alleged and proved that the party making the representations knew

<sup>471</sup> *Fidelity & Casualty Co. v. Teter*, 136 Ind. 672, 36 N. E. 283.

<sup>472</sup> *Kimber v. Young*, 157 Fed. 199, 84 C. C. A. 647.

<sup>473</sup> *Providence Jewelry Co. v. Bailey*, 159 Mich. 285, 123 N. W. 1117.

<sup>474</sup> *Mizner v. Kussell*, 29 Mich. 229.

them to be false at the time of making them. In other words, scienter or conscious falsification is of the essence of the case. This rule applies not only to common-law actions of deceit, but also to similar actions under the modern practice for fraud and fraudulent representations, and also to cases where this kind of fraud is set up in defense to an action at law upon the contract or obligation.<sup>475</sup> But in equity the matter takes on a different aspect, because the courts of chancery may base their award of relief on considerations which are not permitted to enter into a proceeding at law. An action at law for fraud in making false representations and a suit in equity for the rescission of a contract on the ground of misrepresentations are founded on distinct theories. The former is based on an intentional deceit, which of course includes a knowledge of the falsity of what is affirmed. But the latter is aimed at the undoing of a bargain which circumstances would render it inequitable to enforce and the restoration of the parties to the status quo, and this may be consistent even with entire innocence and ignorance on the part of the person making the misrepresentations, or with his belief in their truth.<sup>476</sup> Where one induces another

<sup>475</sup> *Belding v. King*, 159 Fed. 411, 86 C. C. A. 391; *Kimber v. Young*, 137 Fed. 744, 70 C. C. A. 178; *Patent Title Co. v. Stratton* (C. C.) 95 Fed. 745; *Cookey v. King*, 113 Ga. 1163, 39 S. E. 486; *Kimbell v. Moreland*, 55 Ga. 164; *Press v. Hair*, 133 Ill. App. 528; *American Educational Co. v. Taggart*, 124 Ill. App. 567; *Anderson v. Evansville Brewing Ass'n*, 49 Ind. App. 403, 97 N. E. 445; *Security Sav. Bank v. Smith*, 144 Iowa, 203, 122 N. W. 825; *Field v. Turley* (Ky.) 120 S. W. 338; *Live Stock Remedy Co. v. White*, 90 Mo. App. 498; *Adams v. Barber*, 157 Mo. App. 370, 139 S. W. 489; *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432; *Straus v. Norris*, 77 N. J. Eq. 33, 75 Atl. 980; *Faulkner v. Wassmer*, 77 N. J. Eq. 537, 77 Atl. 341, 30 L. R. A. (N. S.) 872; *Powell v. F. C. Linde Co.*, 58 App. Div. 261, 68 N. Y. Supp. 1070; *Clover Farms Co. v. Schubert*, 46 Misc. Rep. 434, 92 N. Y. Supp. 260; *Bell v. James*, 128 App. Div. 241, 112 N. Y. Supp. 750; *Hodgens v. Jennings*, 148 App. Div. 879, 133 N. Y. Supp. 584; *Martin v. Eagle Creek Development Co.*, 41 Or. 448, 69 Pac. 216; *Bailey v. Frazier*, 62 Or. 142, 124 Pac. 643; *Scott v. Helsner*, 33 Pa. Super. Ct. 286; *Jalass v. Young*, 3 Pa. Super. Ct. 422; *Poag v. Charlotte Oil & Fertilizer Co.*, 61 S. C. 190, 39 S. E. 345; *Compare Palmer v. Goldberg*, 128 Wis. 103, 107 N. W. 478.

<sup>476</sup> *Peters v. Lohman*, 171 Mo. App. 465, 156 S. W. 783; *Faulkner*

to enter into a contract with him by the positive assertion of a fact or state of facts, material to the transaction, which do not really exist, and the other relies thereon and is misled to his injury, the view of equity is that it would be unconscionable to permit the party making the assertion to retain the fruits of the bargain which he has thus secured, and therefore he must be held liable as for a species of constructive fraud, even though he may not have known that his statement was false.<sup>477</sup> He is bound at his own peril to know the truth of the matter of which he speaks,<sup>478</sup> and the inquiry is not whether he knew the representation to be false, but whether the other party believed it to be true and was misled by it in entering into the contract.<sup>479</sup> Hence we have the well-settled rule in equity that when rescission of a contract, deed, or other transaction is sought on the ground of misrepresentations of material matters of fact, believed in and acted upon by the party seeking relief, and resulting in his injury or prejudice, it is not necessary to show that the party making the representations knew them to be false, but he will be held responsible for their falsity, though he spoke without knowing anything about the matter, though he himself was misinformed and mistaken, and even though he actually believed in the truth of what he affirmed.<sup>480</sup> A

*v. Wassmer*, 77 N. J. Eq. 537, 77 Atl. 341, 30 L. R. A. (N. S.) 872; *Severson v. Kock*, 159 Iowa, 343, 140 N. W. 220.

<sup>477</sup> *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230.

<sup>478</sup> *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201.

<sup>479</sup> *Kell v. Trenchard*, 142 Fed. 16, 73 C. C. A. 202; *Grim v. Byrd*, 32 Grat. (Va.) 293.

<sup>480</sup> *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42; *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 97 C. C. A. 486; *King v. Lamborn*, 186 Fed. 21, 108 C. C. A. 123; *Simon v. Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; *Kell v. Trenchard*, 142 Fed. 16, 73 C. C. A. 202; *Lanier v. Hill*, 25 Ala. 554; *Goodale v. Middaugh*, 8 Colo. App. 223, 46 Pac. 11; *Ladd v. Charles*, 5 Fla. 395; *Reese v. Wyman*, 9 Ga. 430; *Newman v. H. B. Claffin Co.*, 107 Ga. 89, 32 S. E. 943; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Ellefritz v. Taylor*, 84 Ill. App. 396; *Ingalls v. Miller*, 121 Ind. 188, 22 N. E. 995; *Gardner v. Mann*, 36 Ind. App. 694, 76 N. E. 417; *Woodruff v. Garner*, 27 Ind. 4, 89 Am. Dec. 477; *Gatling v. Newell*, 9 Ind. 572; *May v. Snyder*, 22 Iowa, 525; *Severson v.*

person may be guilty of fraud by stating that he knows a thing to be so, when he only believes it to be so. A representation of a fact, as of the party's own knowledge, and which proves false, is, unless explained, inferred to be willfully false and made with an intent to deceive at least in respect to the knowledge professed.<sup>481</sup> This rule has been stated with careful precision by the Supreme Court of Wisconsin as follows: If one in negotiating with another in contractual matters makes a misrepresentation

Kock, 159 Iowa, 343, 140 N. W. 220; Farnsworth v. Muscatine Produce & Pure Ice Co., 161 Iowa, 170, 141 N. W. 940; Driver v. Hunt, 2 Ky. Law Rep. 435; Shackelford v. Hendley, 1 A. K. Marsh. (Ky.) 496, 10 Am. Dec. 753; Taymon v. Mitchell, 1 Md. Ch. 496; Ginn v. Almy, 212 Mass. 486, 99 N. E. 276; Fisher v. Mellen, 103 Mass. 503; Converse v. Blumrich, 14 Mich. 109, 90 Am. Dec. 230; Hubbard v. Oliver, 173 Mich. 337, 139 N. W. 77; Steinbach v. Hill, 25 Mich. 78; Jones v. Wing, Har. (Mich.) 301; Brooks v. Hamilton, 15 Minn. 26 (Gil. 10); Freeman v. F. P. Harbaugh Co., 114 Minn. 283, 130 N. W. 1110; Yeater v. Hines, 24 Mo. App. 619; Florida v. Morrison, 44 Mo. App. 529; Milan Bank v. Richmond, 235 Mo. 532, 139 S. W. 352; Peters v. Lohman, 171 Mo. App. 465, 156 S. W. 783; Field v. Morse, 54 Neb. 789, 75 N. W. 58; Faulkner v. Wassmer, 77 N. J. Eq. 537, 77 Atl. 341, 30 L. R. A. (N. S.) 872; Hammond v. Pennock, 61 N. Y. 145; Carr v. National Bank & Loan Co., 167 N. Y. 379, 60 N. E. 649, 82 Am. St. Rep. 725; Alker v. Alker (Sup.) 12 N. Y. Supp. 676; Farjeon v. Indian Territory Illuminating Oil Co. (Sup.) 120 N. Y. Supp. 298; Hunt v. Moore, 2 Pa. 105; Lewis v. McLemore, 10 Yerg. (Tenn.) 206; Beatty v. Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Cabaness v. Holland, 19 Tex. Civ. App. 383, 47 S. W. 379; Jesse French Piano & Organ Co. v. Nolan, 38 Tex. Civ. App. 395, 85 S. W. 821; Harris v. Shear (Tex. Civ. App.) 177 S. W. 136; Ross-Armstrong Co. v. Shaw (Tex. Civ. App.) 113 S. W. 558; Haldeman v. Chambers, 19 Tex. 1; Ogden Valley Trout & Resort Co. v. Lewis, 41 Utah, 183, 125 Pac. 687; Smith v. Columbus Buggy Co., 40 Utah, 580, 123 Pac. 580; Grim v. Byrd, 32 Grat. (Va.) 293; Wren v. Moncure, 95 Va. 369, 28 S. E. 588; Linhart v. Foreman, 77 Va. 540; McMullin v. Sanders, 79 Va. 356; Taylor v. Ashton, 11 Mees. & W. 415. Some scattering expressions of opinion contrary to the rule stated in the text may be found in the reports. See, for instance, Walker v. Hough, 59 Ill. 375; Faver v. Bowers (Tex. Civ. App.) 33 S. W. 131; Jasper v. Hamilton, 3 Dana (Ky.) 280; Proctor v. Spratley, 78 Va. 254; Becker v. Colonial Life Ins. Co., 153 App. Div. 382, 138 N. Y. Supp. 491; Dumas v. Ware, 143 Ga. 212, 84 S. E. 538; Krankowski v. Knapp, 268 Ill. 183, 108 N. E. 1006.

<sup>481</sup> Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; Darling v. Stuart, 63 Vt. 570, 22 Atl. 634.



of fact, material to the transaction, to induce the other to act thereon, and such other reasonably does so act, to his prejudice, he may avoid the result on the ground of fraud, actual or constructive, and may have the aid of equity to that end, and it is not a sufficient answer to his claim for the person making the representations to say that he did so honestly, since it is his duty to know whereof he speaks, or not to speak at all as of his knowledge.<sup>482</sup> This rule has also been enacted by statute in Georgia, where it is provided that "fraud may exist by misrepresentation by either party, made with design to deceive, or which does actually deceive, the other party; and in the latter case such misrepresentation voids the sale, though the party making was not aware that his statement was false."<sup>483</sup> But it is said that the rule does not apply in the case of a sale which comes within the rule or doctrine of caveat emptor, that is, where no warranty is given either expressly or by implication, where the purchaser has full opportunity for inspection and is bound to be vigilant in his own interest, and where, consequently, he has no legal right to rely on any representations made to him.<sup>484</sup>

**§ 103. Same; Falsity in Express or Implied Assertion of Knowledge.**—In the contemplation of equity, he who makes a representation as of his own knowledge, without knowing whether it is true or false, whereas it is actually untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts falsely, to his own knowledge, and the law imputes a fraudulent intent.<sup>485</sup> The affirmation of what one does not know or believe to be true is equally, in morals and in law, as unjustifiable as the affirmation of what is known to be positively false.<sup>486</sup> Hence we have the rule that a person who makes repre-

<sup>482</sup> *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201. But representations by a vendor as to the value of land, which he expressly states he has never seen, cannot be deemed fraudulent. *Bunck v. McAulay*, 84 Wash. 473, 147 Pac. 33.

<sup>483</sup> Civ. Code Ga. 1910, § 4113.

<sup>484</sup> *Dorsey v. Watkins* (C. C.) 151 Fed. 340.

<sup>485</sup> *Stimson v. Helps*, 9 Colo. 33, 10 Pac. 290.

<sup>486</sup> *Crislip v. Cain*, 19 W. Va. 438; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

sentations concerning a material fact which is of such a nature as to be susceptible of definite knowledge, and asserts it to be true to his personal knowledge (as distinguished from his belief or opinion), when he does not know whether it is true or not, is guilty of falsehood if the assertion is actually untrue, being conscious of his want of knowledge, even though he supposes or believes it to be true. And if the representations are thus made with the intention that they shall be accepted and acted on by another, who does so act to his prejudice, and the party making the representations secures an undue advantage thereby, it is an actionable fraud, and the party is subject to the same liabilities as if the representations had been made with full knowledge of their falsity.<sup>487</sup> As

<sup>487</sup> *Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Browning v. National Capital Bank*, 13 App. D. C. 1; *Upchurch v. Mizell*, 50 Fla. 456, 40 South. 29; *Miller v. John*, 208 Ill. 173, 70 N. E. 27; *Ames v. Thren*, 125 Ill. App. 312; *Crane v. Schaefer*, 140 Ill. App. 647; *Suively v. Melxsell*, 97 Ill. App. 365; *John Gund Brewing Co. v. Peterson*, 130 Iowa, 301, 106 N. W. 741; *Davis v. Central Land Co.*, 162 Iowa, 269, 143 N. W. 1073, 49 L. R. A. (N. S.) 1219; *Haigh v. White Way Laundry Co.*, 164 Iowa, 143, 145 N. W. 473, 50 L. R. A. (N. S.) 1091; *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Ballard v. Thibodeau*, 109 Me. 559, 84 Atl. 412; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Litchfield v. Hutchinson*, 117 Mass. 195; *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Wann v. Northwestern Trust Co.*, 120 Minn. 493, 139 N. W. 1061; *Flaherty v. Till*, 119 Minn. 191, 137 N. W. 815; *Riggs v. Thorpe*, 67 Minn. 217, 69 N. W. 891; *Vincent v. Corbett*, 94 Miss. 46, 47 South. 641, 21 L. R. A. (N. S.) 85; *Western Cattle Brokerage Co. v. Gates*, 190 Mo. 391, 89 S. W. 382; *Chase v. Rusk*, 90 Mo. App. 25; *Paretti v. Rebenack*, 81 Mo. App. 494; *Miller v. Rankin*, 136 Mo. App. 426, 117 S. W. 641; *Leach v. Bond*, 129 Mo. App. 315, 108 S. W. 596; *Stark Brothers Nurseries & Orchards Co. v. Mayhew*, 160 Mo. App. 60, 141 S. W. 433; *Crosby v. Wells*, 73 N. J. Law, 790, 67 Atl. 295; *Thompson v. Koeving*, 79 N. J. Law, 246, 75 Atl. 752; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Frank v. Bradley & Currier Co.*, 42 App. Div. 178, 58 N. Y. Supp. 1032; *Lambert v. Elmendorf*, 124 App. Div. 758, 109 N. Y. Supp. 574; *Schoeneman v. Chamberlin*, 55 App. Div. 351, 67 N. Y. Supp. 284; *Kramer v. Bjerrum*, 19 App. Div. 332, 46 N. Y. Supp. 496; *Prahar v. Tousey*, 93 App. Div. 507, 87 N. Y. Supp. 845; *Modlin v. Roanoke R. & Lumber Co.*, 145 N. C. 218, 58 S. E. 1075; *Pate v. Blades*, 163 N. C. 267, 79 S. E. 608; *Bonelli v. Burton*, 61 Or. 429, 123 Pac. 37; *Thompson v. Chambers*, 13 Pa. Super. Ct. 213; *United States Gypsum Co. v. Shields* (Tex. Civ. App.) 106 S. W. 724; *Gibbens v. Bourland* (Tex. Civ. App.) 145 S. W. 274; *Goodwin v. Daniel*

stated in one of the cases: "If a man, having no knowledge whatever upon the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts."<sup>488</sup>

The foregoing rule is a rule applicable at law, and not only in equity. It is enforced in actions for damages for deceit or fraud. But since, as stated in the preceding section, scienter is a necessary part of the proof in actions of this kind, whereas it is not so in suits in equity for rescission, it is evident that the case of representations made as of a party's own knowledge, when he is ignorant of the facts, must furnish an even stronger ground for rescission than for an action of deceit. And it is so held.<sup>489</sup> It will be observed that the falsehood in a case of this kind consists in the assertion that the party possesses knowledge which he does not in fact possess. And this need not be an explicit assertion or affirmation that the party speaks from his own knowledge, but may follow as a necessary inference from the form in which he makes his statement. An unqualified statement that a fact exists, made by one to induce another to act on it, implies that the former knows it to exist and speaks from his own knowledge.<sup>490</sup>

(Tex. Civ. App.) 93 S. W. 534; *Benton v. Kuykendall* (Tex. Civ. App.) 160 S. W. 438; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Arrowsmith v. Nelson*, 73 Wash. 658, 132 Pac. 743; *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390; *James v. Pliggott*, 70 W. Va. 435, 74 S. E. 667; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Helberg v. Hosmer*, 143 Wis. 620, 128 N. W. 439. Compare *Bradley v. Oviatt*, 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828; *People's Nat. Bank v. Central Trust Co.*, 179 Mo. 648, 78 S. W. 618. See *O'Neill v. Conway*, 88 Conn. 651, 92 Atl. 425; *Wheatcraft v. Myers*, 57 Ind. App. 371, 107 N. E. 81; *Bloomquist v. Farson*, 88 Misc. Rep. 615, 151 N. Y. Supp. 356; *First Nat. Bank of Tigerton v. Hackett*, 159 Wis. 113, 149 N. W. 703.

<sup>488</sup> *Evans v. Edmonds*, 13 C. B. 786.

<sup>489</sup> *L. D. Garrett Co. v. Appleton*, 101 App. Div. 507, 92 N. Y. Supp. 136; *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390; *Olcott v. Bolton*, 50 Neb. 779, 70 N. W. 366; *Annis v. Ferguson*, 27 Ky. Law Rep. 56, 84 S. W. 553.

<sup>490</sup> *New v. Jackson*, 50 Ind. App. 120, 95 N. E. 328.

Hence a case is made out when it is shown that the representation was made in a form calculated to convey the impression that the party had actual knowledge of the truth of the matter, and intended to convey that impression, and which did actually convey it, though he may not have distinctly asserted that he knew the truth.<sup>491</sup> An intent to deceive is essential to sustain an action for false representations, and the rule that one who makes representations which are untrue, upon a subject as to which he has no knowledge, may be held liable for deceit, should be limited to cases where the circumstances indicate that he intended the injured party to suppose that he spoke from actual knowledge.<sup>492</sup>

These principles are illustrated in a case before the Supreme Court of the United States, where the action was to recover royalties alleged to be due under a mining lease. Defendants alleged and gave evidence to show that, at the time they took the lease, the mine was flooded so that they could not examine it, but the plaintiff represented that it was a valuable mine and would produce a large amount of zinc and other ores and would be a profitable investment. The following instructions given by the court below were approved on appeal: "A person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity. Deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, the truth of which representations the vendor or lessor is bound and must be

<sup>491</sup> *Altoona State Bank v. Hart*, 82 Kan. 398, 108 Pac. 818; *Brown v. Le May*, 101 Ark. 95, 141 S. W. 759; *Booth v. Englert*, 105 App. Div. 284, 94 N. Y. Supp. 700; *Foix v. Moeller* (Tex. Civ. App.) 159 S. W. 1048.

<sup>492</sup> *Marsh v. Falker*, 40 N. Y. 562.

presumed to know." Touching the alleged representations as to the value of the leased property, the court said that "general assertions by a vendor or lessor that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations amounting to deceit, nor are they to be regarded as statements of existing facts upon which an action for deceit may be based, but rather as the expressions of opinion or belief; that, as a general rule, fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established unless it appears that such representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of their being untrue is not essential."<sup>493</sup>

A similar decision was made in a case where it was alleged that a board of water commissioners and its engineer, in printed notices and statements to contractors, and in other verbal statements corroborative of them, for the purpose of supplying information to contractors expected to act upon it in bidding on the construction of a dam and reservoir, made certain representations as to the approximate amount of work in the proposed project. . It was held that such representations carried with them the assertion of being made upon some basis of superior knowledge and information, and the contractors were entitled to accept and act upon them as such; so that, if they acted upon the faith of the representations and they were untrue, the board would be liable for a fraud, although it did not know that the representations were false.<sup>494</sup> So a statement made by an agent to a prospective purchaser of land that he once owned the land himself

<sup>493</sup> *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215.

<sup>494</sup> *Board of Water Com'rs of New London v. Robbins*, 82 Conn. 623, 74 Atl. 938.

and knows the title to be good is an assertion of positive knowledge, and, if untrue, is a legal fraud, notwithstanding the agent acted in good faith and believed the title was good.<sup>495</sup> And where a defendant induced the plaintiff to purchase certain land by falsely and fraudulently representing that the same was unincumbered, to defendant's personal knowledge, he cannot thereafter assert as a defense to the action for damages sustained by the falsity of such representations, that he in fact had no knowledge on the subject to which they related.<sup>496</sup> So one professing to know a true boundary of land pointed out to a purchaser cannot escape liability for misrepresenting the true boundary, because he did not know that the boundary pointed out was incorrect.<sup>497</sup>

**§ 104. Same; Imputed or Constructive Knowledge of Falsity.**—When one person induces another to part with property or rights or otherwise to change his situation, by means of representations which are false in fact, it is no excuse or defense for the former to say that he was ignorant of the falsity of the representations, or that he sincerely believed he was speaking the truth, if the circumstances are such that the law will impute to him actual knowledge of the matter spoken of, that is to say, in cases where he must be presumed to have known the truth because he had full opportunities for knowing it, or perhaps exclusive opportunities, and because it was his duty to know the facts.<sup>498</sup> Thus, for example, where false repre-

<sup>495</sup> *White v. Reitz*, 129 Mo. App. 307, 108 S. W. 601.

<sup>496</sup> *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170.

<sup>497</sup> *Smith v. Packard*, 152 Iowa, 1, 130 N. W. 1076.

<sup>498</sup> *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; *Patent Title Co. v. Stratton* (C. C.) 95 Fed. 745; *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200; *Mattingly v. Russell*, 15 Ky. Law Rep. 875; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Bank of Polk v. Wood*, 189 Mo. App. 62, 173 S. W. 1093; *Whitehurst v. Life Ins. Co. of Virginia*, 149 N. C. 273, 62 S. E. 1067; *Dunham v. Smith*, 15 Okl. 283, 81 Pac. 427; *Joplin v. Nunnelly*, 67 Or. 566, 134 Pac. 1177; *Curtley v. Security Sav. Soc.*, 46 Wash. 50, 89 Pac. 180; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811. The drawer of a check must be presumed to know the state of his account, and if he gives a check on a bank in which he has no funds, in payment for goods purchased, he may be liable in an action for deceit. *King v. Murphy* (Co. Ct.) 151 N. Y. Supp. 476.

sentations as to the condition and capacity of a typesetting machine sold to defendant were made by the inventor of the machine, it will be presumed that he was fully informed as to its qualities, and that the representations were made with knowledge of their falsity.<sup>499</sup> So, if the vendor of a note is aware of such facts as would lead a reasonable man to infer the insolvency of the maker and the worthlessness of the paper, this is equivalent to actual knowledge on his part.<sup>500</sup> And generally a party selling property is presumed to know whether the representations which he affirmatively makes in respect to it are true or false, and if he knows them to be false, it is a positive fraud.<sup>501</sup> So the cashier of a bank may be held liable for false representations as to the value of stock sold by him, whether he knew the representations to be false or not.<sup>502</sup>

Whether or not, within the meaning of this rule, the officers of a corporation are to be charged with constructive knowledge of the falsity of representations made by them concerning its business or the value of its stock, because they must be presumed to have ample opportunities of learning the state of its affairs and to be under the duty of doing so, is not so clear. But there is authority for saying (at least in cases where an extensive or complicated business is concerned) that the officers of a corporation are justified in relying on reports, statements, and data furnished them by their subordinates, and are not responsible for the falsity of representations founded on such information, provided that such subordinates are competent and ordinarily trustworthy, and that the officers had no knowledge of any inaccuracy in their reports or statements and were not guilty of gross negligence in failing to verify the ultimate details.<sup>503</sup> Thus, an action of deceit cannot be maintained against the directors of a bank by a purchaser of its stock, which was worthless, on the basis of false state-

<sup>499</sup> *Unitype Co. v. Ashcraft Bros.*, 155 N. C. 63, 71 S. E. 61.

<sup>500</sup> *Gordon v. Irvine*, 105 Ga. 144, 31 S. E. 151.

<sup>501</sup> *Snively v. Meixsell*, 97 Ill. App. 365.

<sup>502</sup> *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136.

<sup>503</sup> *Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co.*, 148 Fed. 674, 78 C. C. A. 408; *Nash v. Rosesteel*, 7 Cal. App. 504, 94 Pac. 850.



ments as to the bank's prosperous condition, made in a statement or report prepared by the cashier and to which he affixed the directors' signatures, or made by the directors themselves in good faith on details furnished them by the cashier, if there is no evidence that they acted in bad faith or that they had any actual knowledge of the insolvency of the bank.<sup>504</sup> It is not sufficient to show that they might, by the exercise of ordinary care, have discovered the falsity of the report,<sup>505</sup> for the question is one of fraud and not of negligence, and a director's failure to perform the duty incumbent upon him as a director does not operate to render him guilty of affirmative fraud.<sup>506</sup> But it is otherwise, of course, if the directors have reasonable cause to know or to believe that the report is incorrect, as where they had previously been warned by the Comptroller of the Currency that certain listed assets were doubtful and must be immediately collected or else written off the books, but nevertheless they allowed a report to be issued, in which such assets appeared, without making any examination.<sup>507</sup> But the rule appears to be otherwise in regard to the president of a corporation. This officer is supposed to be the active head and manager of the business, and it is his duty to be intimately acquainted with everything of moment in its affairs, and therefore he is presumed to possess knowledge of all that he could learn by the full discharge of his duties, and according to some of the cases, this presumption is conclusive. Hence if a person is injured in consequence of his reliance on false representations contained in a statement or report of the corporation issued over the president's signature, it is no defense for the latter to say that he was ignorant of the falsity of the representations.<sup>508</sup> So, the

<sup>504</sup> *Foster v. Gibson*, 18 Ky. Law Rep. 716, 38 S. W. 144; *Uteley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569.

<sup>505</sup> *Pieratt v. Young*, 20 Ky. Law Rep. 1815, 49 S. W. 964. But compare *Mason v. Moore*, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240.

<sup>506</sup> *McCauley v. Brown*, 99 Mo. App. 625, 74 S. W. 464.

<sup>507</sup> *Taylor v. Thomas*, 195 N. Y. 590, 89 N. E. 1113.

<sup>508</sup> *Ward v. Trimble*, 103 Ky. 153, 44 S. W. 450; *Trimble v. Reid*, 19 Ky. Law Rep. 604, 41 S. W. 319; *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666; *Mutual Building & Loan Ass'n v. McGee*

president of a corporation who participates in the issuance of bonds which falsely represent that they are secured by all the property of the company, is liable in an action for deceit brought by a purchaser of the bonds, although the president was ignorant of the sale in question.<sup>509</sup>

**§ 105. Same; Statements Made Recklessly Without Knowledge of Falsity.**—Although a person who has induced another, by false representations, to enter into a contract, did not know at the time that the representations were false, yet if he made them recklessly without any knowledge of the facts represented,—that is with a careless indifference as to the truth or falsity of his statements and with no concern as to the injurious consequences to a person deceived and misled by them,—they will be deemed fraudulent in law, so as to entitle the injured party to rescind the contract or to maintain an action of deceit.<sup>510</sup> “In order to maintain an action for deceit in making false repre-

(Tex. Civ. App.) 43 S. W. 1030. But compare *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794.

<sup>509</sup> *Stickel v. Atwood*, 25 R. I. 456, 56 Atl. 687.

<sup>510</sup> *L. J. Mueller Furnace Co. v. Cascade Foundry Co.*, 145 Fed. 596, 76 C. C. A. 286; *McCoy v. Prince*, 11 Ala. App. 388, 66 South. 950; *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Ann. Cas. 1913A, 386; *Upchurch v. Mizell*, 50 Fla. 456, 40 South. 29; *Herman v. Foster & Reynolds Co.*, 185 Ill. App. 97; *Richards v. Frederickson* (Iowa) 153 N. W. 151; *Goodwin v. Fall*, 102 Me. 353, 66 Atl. 727; *Vincent v. Corbett*, 94 Miss. 46, 47 South. 641, 21 L. R. A. (N. S.) 85; *Ray County Sav. Bank v. Hutton*, 224 Mo. 42, 123 S. W. 47; *Chappell v. Boram*, 159 Mo. App. 442, 141 S. W. 19; *Champion Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050; *Morgan County Coal Co. v. Halderman*, 254 Mo. 596, 163 S. W. 828; *Stacey v. Robinson*, 184 Mo. App. 54, 168 S. W. 261; *Ruddy v. Gunby* (Mo. App.) 180 S. W. 1043; *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; *Stolitzky v. Linscheid*, 150 App. Div. 253, 134 N. Y. Supp. 805; *Bell v. James*, 128 App. Div. 241, 112 N. Y. Supp. 750 (affirmed, 198 N. Y. 513, 92 N. E. 1078); *Whitehurst v. Life Ins. Co. of Virginia*, 149 N. C. 273, 62 S. E. 1067; *Unitype Co. v. Ashcraft Bros.*, 155 N. C. 63, 71 S. E. 61; *Parmlee v. Adolph*, 28 Ohio St. 10; *Robertson v. Frey*, 72 Or. 599, 144 Pac. 128; *McFarland v. Carlsbad Hot Springs Sanitarium Co.*, 68 Or. 530, 137 Pac. 209, Ann. Cas. 1915C, 555; *Aitken v. Bjerkvig* (Or.) 150 Pac. 278; *Dutton v. Pyle*, 7 Pa. Super. Ct. 126; *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43; *Bradley v. Tolson*, 117 Va. 467, 85 S. E. 466; *Porter v. Beattle*, 88 Wis. 22, 59 N. W. 499; *Knudson v. George*, 157 Wis. 520, 147 N. W. 1003; *Rogers v. Rosenfeld*, 158 Wis. 285, 149 N. W. 33.

sentations, it is not necessary to show that the party making them knew them to be false. If a party recklessly makes a false representation, of the truth or falsehood of which he knows nothing, for the fraudulent purpose of inducing another, in reliance upon it, to make a contract or do an act to his prejudice, and the other party does rely on it, he is liable for the fraud as much as if he had known it to be false."<sup>511</sup> So in another case it was said: "Such an action requires for its foundation a false statement knowingly made, or a false statement made in ignorance of, and in reckless disregard of, its truth or falsity, and of the consequences such a statement may entail. The evil intent—the intent to deceive—is the basis of the action. Such an intent, it is true, may be inferred from the positive statement as of his own knowledge of a fact concerning which one knows he has no knowledge at all, because such a statement shows such a contempt for the truth, and such a reckless disregard of the rights of others who may rely upon it, that it is deemed sufficient evidence of an evil intent to warrant a recovery when damages have resulted from the falsehood."<sup>512</sup> In effect, to establish a case of fraudulent misrepresentations, it is necessary to show not only their falsity in fact but also a dishonest condition of mind on the part of the person making them with reference to their truthfulness. But this does not mean that he must be shown to have been conscious of their falsity. It is enough if it is shown that he made the representations without any belief in their truth, or with a conscious indifference, not caring whether they were true or not.<sup>513</sup> It is not easy to say exactly how this dishonest condition of mind may be established, in the face of the party's testimony that he did not know the representation to be false. But in general, any person of integrity, and who is careful to speak the truth, will not venture on a positive assertion, intended to influence another person, unless he has at least substantial ground for believing that what he says is true. Hence a

<sup>511</sup> Beebe v. Keep, 28 Mich. 53.

<sup>512</sup> Union Pac. R. Co. v. Barnes, 64 Fed. 80, 12 C. C. A. 48.

<sup>513</sup> Shackett v. Bickford, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933.

false statement, put forward in a positive manner but without any sufficient ground for believing it to be true, may be said to have been made recklessly.<sup>514</sup> And several cases rule broadly that one is liable for a false representation, on which another relies to his prejudice, whether or not he knew of its falsity, where he had full opportunity to know that it was not true.<sup>515</sup> Thus, the fact that the president of a bank had excellent opportunities to know the truth authorizes a finding that a false statement of the condition of the bank, published by him, was "made in reckless disregard of its truth or falsity."<sup>516</sup>

**§ 106. Same; Good Faith and Honest Belief in Statements Made.**—An action at law for fraud or deceit cannot be maintained unless a guilty knowledge, actual or constructive, is established, either by showing that the representation was false within the knowledge of the person making it, or that he made it as a positive assertion calculated to convey the impression that he had actual knowledge of its truth when he was conscious that he had no such knowledge, or that the statement was made recklessly and without knowing or caring whether it were true or false. For fraud implies the doing of a wrong willfully; and hence an innocent misrepresentation made through mistake without knowledge of its falsity, or which is honestly believed to be true, and made with no intention to deceive, is not actionable fraud.<sup>517</sup> "A person who has rea-

<sup>514</sup> *Devers v. Sollenberger*, 25 Pa. Super. Ct. 64.

<sup>515</sup> *Hindman v. First Nat. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Wright v. United States Mortgage Co.* (Tex. Civ. App.) 42 S. W. 789; *Kerr v. Shurtleff*, 218 Mass. 167, 105 N. E. 871; *Bingham v. Fish*, 86 N. J. Law, 316, 90 Atl. 1106; *Agnew v. Hackett*, 80 Wash. 236, 141 Pac. 319.

<sup>516</sup> *Trimble v. Reid*, 19 Ky. Law Rep. 604, 41 S. W. 319.

<sup>517</sup> *Pittsburgh Life & Trust Co. v. Northern Cent. Life Ins. Co.*, 148 Fed. 674, 78 C. C. A. 408; *First Nat. Bank v. People's Nat. Bank*, 97 Ark. 15, 132 S. W. 1008; *Mentzer v. Sargeant*, 115 Iowa, 527, 88 N. W. 1068; *Eblin v. Sellers*, 15 Ky. Law Rep. 539; *Boulden v. Stillwell*, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258; *Lovelace v. Suter*, 93 Mo. App. 429, 67 S. W. 737; *Serrano v. Miller & Teasdale Commission Co.*, 117 Mo. App. 185, 93 S. W. 810; *Snyder v. Stemmons*, 151 Mo. App. 156, 131 S. W. 724; *Buchall v. Higgins*, 109 App.

son to believe, and actually believes, a particular fact to be true, and accordingly represents what he believes, is not liable to an action merely because it turns out that he was mistaken and that his representation was unintentionally false.”<sup>518</sup> Thus, where the directors of a co-operative life insurance society honestly believe it to be incorporated, and so represent it, such a representation is not fraudulent at law, although the society is not legally incorporated.<sup>519</sup> And the fact that the seller of property (not standing in any confidential relation to the purchaser) makes false representations to induce the sale thereof, though he has the means of knowledge by which he could have determined the falsity of the statements made, does not render him liable in an action of deceit, if his statements were made in good faith.<sup>520</sup> Again, in a case in New York, the action was brought against a landlord for injuries to the tenant by the fall of a ceiling in the apartment demised, and it was alleged that the defendant falsely represented to the plaintiff that the ceiling was safe, but there was no allegation that the defendant did not believe that such statement was true, or that he intended to deceive the plaintiff, and it was held that the complaint was not sustainable on the theory that a cause of action for fraud was alleged.<sup>521</sup> So again, where the seller of a mine told the purchaser (among other things) that a car load of ore taken from the mine assayed 68 ounces to the ton, and this statement was based on in-

Div. 607, 96 N. Y. Supp. 241; *Moran v. Brown*, 113 N. Y. Supp. 1038. But in Michigan this rule is entirely rejected. It is there held that if a representation is false in fact, and actually deceives the one to whom it is made, it is an actionable fraud, though made in good faith and with every reason to believe that it is true. It is sufficient that the representation is false in fact, provided the defendant is benefited by the resulting loss to the plaintiff. But this rule applies only in actions against a party to the contract, and not when the representations are made by a third person or an agent of the other party to the contract. *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379.

<sup>518</sup> 2 Add. Torts (Wood's edn.) 403, citing *Collins v. Evans*, 5 Q. B. 826; *Ormrod v. Huth*, 14 Mees. & W. 664; *Childers v. Wooler*, 29 Law J. Q. B. 129.

<sup>519</sup> *Perkins v. Fish*, 121 Cal. 317, 53 Pac. 901.

<sup>520</sup> *Boddy v. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769.

<sup>521</sup> *Kushes v. Ginsberg*, 188 N. Y. 630, 81 N. E. 1168.

formation furnished to the seller by the superintendent of the mine, and was made by the seller in good faith, it was held not a fraudulent representation, although it was in fact not true.<sup>522</sup> But even at law, as distinguished from the different viewpoint of equity, "it must not be concluded that the purchaser who has been induced by false representations to make the contract is always without remedy because the vendor believed the statements to be true and was innocent of any fraudulent intent. The cases only establish that the vendor has committed no wrong, and is therefore not liable in an action of deceit or any other action founded on tort. But in very many instances a representation made by the vendor amounts in law to a warranty, and when this is the case, the purchaser has remedies on the contract, for breach of the warranty."<sup>523</sup>

In a few of the decisions, the attempt has been made to apply these legal principles to the equitable remedy of rescission, on the theory that good faith and an honest belief in the statements made should furnish a protection against even this.<sup>524</sup> In an English case it is said: "Where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration."<sup>525</sup> And it has sometimes been thought that a court of equity should not rescind a contract for an innocent misrepresentation in regard to the subject-matter in a case where the rule of caveat emptor will apply.<sup>526</sup>

But these decisions appear to lose sight of the consideration that it would be contrary to all the principles of equity to permit a party to retain the advantages gained by a bargain into which the other party would not have entered at

<sup>522</sup> *Crocker v. Manley*, 164 Ill. 282, 45 N. E. 577, 56 Am. St. Rep. 196.

<sup>523</sup> 1 Benj. Sales, § 713.

<sup>524</sup> *Stebbins v. Eddy*, 4 Mason, 414, Fed. Cas. No. 13,342; *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. 346.

<sup>525</sup> *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580.

<sup>526</sup> *Brooks v. Hamilton*, 15 Minn. 28 (Gil. 10).

all if he had not been deceived or misled. From this point of view, it is entirely immaterial whether the deception was brought about intentionally or was the result of mistake or accident. The possession of an inequitable advantage, gained by deception, is the point which chancery regards. And though a court of law might not award damages against one thus gaining an advantage through innocent misrepresentations, it is certainly in accordance with good conscience to require him to surrender the advantage so gained, and to restore both parties to their former situation, that is, to rescind the contract. And this doctrine is supported by the great preponderance of the authorities.<sup>527</sup> In one of the cases it appeared that a person living in a distant state and having no independent means of knowledge was induced to convey an interest in a mining claim, for a grossly inadequate consideration, on the representation of the purchaser that the seller had no real interest therein, and that he desired the conveyance merely for the purpose of fortifying his own title against pending litigation. The first part of this representation was not true, although the purchaser honestly believed that it was. It was held that the conveyance should be set aside. The court said: "From all the evidence introduced on behalf of the defendants, it is made perfectly plain that Devereux and those acting

<sup>527</sup> *Baker v. Clark* (Ala. App.) 68 South. 593; *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200; *Smith v. Mitchell*, 6 Ga. 458; *Weise v. Grove*, 123 Iowa, 585, 99 N. W. 191; *Snyder v. Findley*, 1 N. J. Law, 78, 1 Am. Dec. 193; *Straus v. Norris*, 77 N. J. Eq. 33, 75 Atl. 980; *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379; *Beebe v. Young*, 14 Mich. 136; *Atlanta & C. A. Ry. Co. v. Victor Mfg. Co.*, 93 S. C. 397, 76 S. E. 1091; *Farmers' Bank of McCormick v. Talbert*, 97 S. C. 74, 81 S. E. 305; *Culbertson v. Blanchard*, 79 Tex. 486, 15 S. W. 700; *Brand v. Odom* (Tex. Civ. App.) 156 S. W. 547; *Magill v. Coffman* (Tex. Civ. App.) 129 S. W. 1146; *Gibbens v. Bourland* (Tex. Civ. App.) 145 S. W. 274; *Corey v. Boynton*, 82 Vt. 257, 72 Atl. 987; *Grosh v. Ivanhoe Land & Imp. Co.*, 95 Va. 161, 27 S. E. 841; *Bradford v. Adams*, 73 Wash. 17, 131 Pac. 449; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014. And see, further, *MacDonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73; *Lathrop v. Maddux*, 58 Colo. 258, 144 Pac. 870; *Maywood Stock Farm Importing Co. v. Pratt* (Ind. App.) 110 N. E. 243; *Half Co. v. Jones* (Tex. Civ. App.) 169 S. W. 906; *Taylor v. First State Bank* (Tex. Civ. App.) 178 S. W. 35; *First Nat. Bank v. Hackett*, 159 Wis. 113, 149 N. W. 703.



with him constantly insisted that the Wood heirs had no right or interest in the mine, and it is equally plain that Mrs. Billings finally consented to execute a deed because she believed the representations thus made were true. It is, under the circumstances of this case, immaterial whether Devereux knew the falsity of these statements or not. Even though he believed them to be true, yet as it now appears beyond doubt that these statements were without foundation, and that the Wood heirs held the title to one-third of the property, equity will not permit the grantee in the deed to enjoy the benefits thereof when it appears that the grantor was induced to execute it through a total misapprehension of her right and title, which misapprehension was caused by the representations of the grantee or his agent, even though such untrue representations were at the time made in good faith. In such case the inequity would exist, not in making the representations originally, but in claiming the benefit thereof after discovery that the other party had been misled, to her injury, by relying on the statements made for the purpose of inducing action on her part, which now appear to have been wholly untrue. Thus in *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44, it is held that where the parties stand in unequal position, and one party, reposing confidence in the statements made by the other, surrenders rights without a proper understanding of them, the conveyance thereof will be set aside, even though there was no fraudulent intent on the part of the person making the same. In *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42, the rule is stated to be that a material misrepresentation, if relied upon, will justify setting aside a contract, even though innocently made, because thereby the contracting party is misled to his injury. The facts of the case at bar bring the same fully within the ruling of the Supreme Court in the case last cited, to wit, that a misrepresentation or mistake, innocently made, is ground for rescinding a contract, if the misrepresentation was about a material matter, if the other party relied thereon, having a right so to do, and was thereby misled to his substantial injury.”<sup>528</sup>

<sup>528</sup> *Billings v. Aspen Mining & Smelting Co.*, 51 Fed. 338, 2 C. O. A. 252.

This rule has been incorporated in the statutes of some of the states. Thus, in Alabama and Georgia, it is provided: "Misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud."<sup>529</sup>

**§ 107. Same; Reasonable Ground to Believe Statements True.**—In several of the states where the substantive law has been codified, the statutes declare that "actual fraud" may be committed by "the positive assertion in a manner not warranted by the information of the party making it, of that which is not true, though he believes it to be true," and that "deceit" shall include, among other things, "the assertion as a fact of that which is not true, by one who has no reasonable ground for believing it to be true."<sup>530</sup> Under these statutes, therefore, a positive representation which is actually untrue has exactly the same effect, when the person making it has no reasonable ground for believing it to be true, as when he knows it to be false.<sup>531</sup> And on the other hand, if the person making the representation believes it to be true, and has reasonable grounds for so believing, there is no actionable fraud committed, however false it may actually be.<sup>532</sup> In some other states also this principle is recognized as valid. That is to say, it is held that a statement or representation is considered false and fraudulent

<sup>529</sup> Code Ala. 1907, § 4298; Civ. Code Ga. 1895, § 4026. And see *Southern States Fire & Casualty Ins. Co. v. Wilmer Store Co.*, 180 Ala. 1, 60 South. 98; *Hafer v. Cole*, 176 Ala. 242, 57 South. 757; *Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *Camp v. Carithers*, 6 Ga. App. 608, 65 S. E. 583; *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609.

<sup>530</sup> Civ. Code Cal., §§ 1572, 1710; Rev. Civ. Code Mont., §§ 4978, 5073; Rev. Civ. Code N. Dak., §§ 5293, 5388; Rev. Civ. Code S. Dak., §§ 1201, 1293; Rev. Laws Okl. 1910, §§ 903, 994.

<sup>531</sup> *Howe v. Martin*, 23 Okl. 561, 102 Pac. 128, 138 Am. St. Rep. 840; *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018; *Garvin v. Harrell*, 27 Okl. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744; *Joines v. Combs*, 38 Okl. 380, 132 Pac. 1115. If the seller does not believe his representations to be true, it is no defense that he gained the information upon which they were based from an apparently reliable source. *Hockensmith v. Winton*, 11 Ala. App. 670, 66 South. 954.

<sup>532</sup> *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351.

in law, although the person making it does not know it to be false, if he has no reasonable ground to believe it to be true; that is, if he either makes the statement with absolutely no knowledge of its truth or falsity, or asserts it as a fact when he has such slight and inconsequential knowledge of the conditions that no reasonably prudent man would act upon such information, in a matter important to himself, without a further investigation.<sup>533</sup> And conversely, if the circumstances are such as to justify a belief in the truth of the statement made, it is not fraudulent, although false.<sup>534</sup>

But while this test may be fairly satisfactory in an action of deceit or an action to recover damages for alleged fraud, it has been considered inappropriate when the relief sought is the rescission of a contract or other obligation. To establish the fact that the party making a representation believed it to be true, and had reasonable grounds for his belief, will prove his sincerity, and so eliminate from the case that element of turpitude or sinister design which lies at the base of any action of tort. But one who relies upon a false representation, and is injured thereby, is in exactly the same position whether the party making the representation was sincere or insincere. There may not have been such conscious fraud as would lay a foundation for the recovery of damages; yet it does not follow that the injured party should not be entitled to rescind. Accordingly, some of the decisions have rejected the test proposed, as to whether the party had or had not reason to believe his representations true, and have found a sufficient ground for rescission in the deception of, and consequent injury to, the other party.<sup>535</sup> And it has been held by a court of high authority that even due diligence to ascertain the truth in

<sup>533</sup> *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145; *Reese River Co. v. Smith*, L. R. 4 H. L. 64; *Weir v. Bell*, 3 Exch. Div. 238; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Hunter v. French League Safety Cure Co.*, 96 Iowa, 573, 65 N. W. 828; *Crooker v. White*, 162 Ala. 476, 50 South. 227; *Cox v. Frazer*, 21 Ky. Law Rep. 579, 52 S. W. 796.

<sup>534</sup> *Gill v. Anglo-American Ass'n*, 21 Ky. Law Rep. 690, 52 S. W. 929.

<sup>535</sup> *Hammatt v. Emerson*, 27 Me. 308, 46 Am. Dec. 598.

regard to statements made as of matters of fact within one's own knowledge is not enough to relieve the maker of them of liability, if they are false and are relied upon as true, and if the person to whom they are made suffers loss thereby.<sup>586</sup> Still there may be circumstances under which a defendant might well be entitled to plead his reasonable belief in the truth of his statements, as, for instance, where the determination of the truth of the matter requires technical or specialized knowledge, and the statements were based on advice or information received from persons relied on as possessing that kind of knowledge and as imparting it truthfully. Thus, fraud cannot be imputed by law to one who makes representations concerning the title to real estate in honest reliance on a certificate furnished by the keeper of the records and on the advice of counsel.<sup>587</sup> And where a defendant is shown to have used care in investigating the validity of a franchise owned by a corporation which he represented, and was advised by counsel on whom he had a right to rely, he is not liable for fraud in representing the validity and value of such franchise, in selling the stock and bonds of the corporation, although the franchise afterwards proved to be almost worthless.<sup>588</sup> But on the other hand (even under the statutory provisions mentioned in the beginning of this section), where a seller makes representations as to the kind or quality of the goods sold, which are relied on by the purchaser, the seller is liable for any damages accruing to the purchaser by reason of the falsity of the representations, even though the seller believed the representations to be true, since, in this case, he is bound to know as a matter of fact whether or not the representations are true.<sup>589</sup>

**§ 108. Intention to Deceive or Mislead.**—In an action of deceit or to recover damages for fraudulent misrepresentations, or where such misrepresentations are set up in defense to an action on a contract, it is necessary to allege and show

<sup>586</sup> *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427.

<sup>587</sup> *Elwell v. Russell*, 71 Conn. 462, 42 Atl. 862.

<sup>588</sup> *Lane v. Fenn*, 65 Misc. Rep. 336, 120 N. Y. Supp. 237.

<sup>589</sup> *McCabe v. Desnoyers*, 20 S. D. 581, 108 N. W. 341.

an intention to deceive, or to defraud by means of a deception, and the action cannot be sustained, or the defense prevail, if it appears that the representations were made innocently and in good faith, without any intention to deceive, or through mere negligence or inadvertence.<sup>540</sup> Thus, for example, it has been held that a pawnbroker who negligently issues a ticket for a diamond ring, when the stone in the ring is not genuine, is not liable in an action for fraud brought by one who bought the pawn ticket and afterwards redeemed the ring.<sup>541</sup> And so, to recover against a "Christian Science" healer, on account of deceit based on his statement that he could and would cure the plaintiff, the latter must not only prove that the representation was false, but also that it was made with a fraudulent intent.<sup>542</sup> This rule, however, has not been universally accepted. In a few states it is held that where one has made representations of fact, shown to be false, and on which the other party has relied, the good faith of the party making the representations is immaterial in an action by the injured party to recover damages, or in an action by the other party where the injured party pleads the fraud as a defense, because in such cases the person making the representations should be held responsible for the reasonable consequences of his acts.<sup>543</sup>

Some of the decisions have also applied a similar rule in cases where the action was not one of tort, but to obtain the

<sup>540</sup> *Pittsburg Life & Trust Co. v. Northern Central Life Ins. Co.* (C. C.) 140 Fed. 888, affirmed, 148 Fed. 674, 78 C. C. A. 408; *Brown v. Le May*, 101 Ark. 95, 141 S. W. 759; *Hodgkins v. Dunham*, 10 Cal. App. 690, 103 Pac. 351; *Andalman v. Chicago & N. W. Ry. Co.*, 153 Ill. App. 169; *Furnas v. Friday*, 102 Ind. 129, 1 N. E. 296; *Clement, Bane & Co. v. Swanson*, 110 Iowa, 106, 81 N. W. 233; *Pierce v. Cole*, 110 Me. 134, 85 Atl. 567; *Jolliffe v. Collins*, 21 Mo. 338; *Stratton v. Dudding*, 164 Mo. App. 22, 147 S. W. 516; *Summers v. Metropolitan Life Ins. Co.*, 90 Mo. App. 691; *Vogt v. Vogt*, 119 App. Div. 518, 104 N. Y. Supp. 164. And see *Hawkins v. Edwards*, 117 Va. 311, 84 S. E. 654.

<sup>541</sup> *Feingold v. I. Wiesenberger Co.*, 81 Misc. Rep. 126, 142 N. Y. Supp. 319.

<sup>542</sup> *Spead v. Tomlinson*, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432.

<sup>543</sup> *Bauer v. Taylor*, 4 Neb. Unof. 710, 98 N. W. 29; *Hillgas v. Kuns*, 86 Neb. 68, 124 N. W. 925, 26 L. R. A. (N. S.) 284, 20 Ann. Cas. 1124; *O'Neal v. Welsman*, 39 Tex. Civ. App. 592, 88 S. W. 290.

rescission of a contract or the cancellation of an obligation. According to these authorities, such an action cannot be maintained without showing an actual fraudulent intention to deceive, as well as the reliance of the injured party on the false representations.<sup>544</sup> Thus, it has been said: "Fraud means more than a mere false statement ignorantly or erroneously made under a misapprehension and without any intention or design to deceive. It consists in the false representation or concealment of material facts with intent to deceive. Fraud occurs where one party substantially misrepresents a material fact peculiarly within his own knowledge, in consequence of which a delusion is created, or makes a statement which he knows to be untrue, and which is naturally calculated to lull the suspicions of a careful man, and induce him to forego inquiry into a matter upon which the other party had knowledge or information, although such information may not be exclusively within his own reach. But a representation, though false, will not vitiate a contract unless it be fraudulent also, and operates as an inducement influencing the party to enter into it."<sup>545</sup> So the rule stated by the English cases is that, "where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration," and where a representation as to a state of facts is made in good faith, the party believing it to be true at the time, and its falsity is demonstrated only as the result of a lawsuit with third parties, it cannot be said to have been fraudulent.<sup>546</sup>

But these views are not sustained by the preponderance of judicial opinion. On the contrary, and especially in the later decisions, it is generally laid down that no corrupt or sinister intention to deceive or mislead need be shown in

<sup>544</sup> *Holt v. Sims*, 94 Minn. 157, 102 N. W. 386; *Wood v. Evans*, 43 Mo. App. 230; *Enright v. Fellheimer*, 25 Misc. Rep. 664, 56 N. Y. Supp. 366; *Jalass v. Young*, 3 Pa. Super. Ct. 422; *Scott v. Boyd*, 101 Va. 28, 42 S. E. 918.

<sup>545</sup> *Kent County R. Co. v. Wilson*, 5 Houst. (Del.) 49, 56.

<sup>546</sup> *Kennedy v. Panama, New Zealand & Australian Royal Mail Co.*, L. R. 2 Q. B. 580.

order to warrant the rescission of a contract. The motive or cause which actuated the party making the representations is not material. If any intention on his part is to be shown, it is the intention that the other party should rely and act upon the representations, not an intention to deceive him. This being shown, together with the actual falsity of the representations, and such party's reliance on them, a case for rescission is made out, without proof of any fraudulent design to deceive.<sup>547</sup> In Michigan, it is stated to be the settled doctrine that if there was in fact a misrepresentation, although made innocently, and its deceptive influence was effective, its consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he will have a right of action for the damages caused thereby, and of course, for even stronger reasons, a right of rescission, and that, this rule being fully established in equity, there is no reason why it should not equally prevail in a court of law.<sup>548</sup> And elsewhere it is said that the motives which actuate a person in making false representations are wholly immaterial, since the law will infer an improper motive if what a party states is false within his own knowledge and is the cause of injury to another.<sup>549</sup> But it is always necessary that the representation should have been made with the intention that it should be acted upon by the person to whom it was made or by one to whom it

<sup>547</sup> *Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co.* (C. C.) 140 Fed. 888 (affirmed, 148 Fed. 674, 78 C. C. A. 408); *Pritchett v. Fife*, 8 Ala. App. 462, 62 South. 1001; *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Whiting v. Price*, 169 Mass. 576, 48 N. E. 772, 61 Am. St. Rep. 307; *Pennington v. Roberge*, 122 Minn. 295, 142 N. W. 710; *Bishop v. Seal*, 87 Mo. App. 256; *Hammond v. Pennock*, 61 N. Y. 145; *Cramsey v. Sterling*, 188 N. Y. 602, 81 N. E. 1162; *Silverman v. Minsky*, 186 N. Y. 576, 79 N. E. 1116; *Zagarino v. Kurzrok*, 135 App. Div. 763, 119 N. Y. Supp. 907; *Weller v. Bartlett* (Sup.) 45 N. Y. Supp. 626; *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914; *Carter v. Cole* (Tex. Civ. App.) 42 S. W. 369; *Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 78 S. W. 557. And see *Bethea-Starr Packing & Shipping Co. v. Mayben* (Ala.) 68 South. 814; *Pepper v. Vedova*, 26 Cal. App. 406, 147 Pac. 105; *Paschal v. Hudson* (Tex. Civ. App.) 169 S. W. 911.

<sup>548</sup> *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Totten v. Burhans*, 91 Mich. 495, 51 N. W. 1119; *Krause v. Cook*, 144 Mich. 365, 108 N. W. 81.

<sup>549</sup> *John V. Farwell Co. v. Nathanson*, 99 Ill. App. 185.



was intended to be communicated.<sup>550</sup> Thus, where the defendant had made certain representations to the plaintiff to be communicated to a creditor of the defendant, in order to obtain an extension of time on a claim which was afterwards transferred to the plaintiff, but the defendant did not know that a note given in payment of the claim was to be taken by the plaintiff, it was held that the latter could not recover for deceit, as the representations were not made with the intention of inducing him to act.<sup>551</sup> So a seller who puts false recitals in the contract of sale as to the amount of the purchase price, whereby the purchaser's agent is enabled to defraud the purchaser, is not liable to the latter, in the absence of a showing that his purpose in inserting such recitals was to bring about that result.<sup>552</sup> But a complaint alleging that, because of the false and fraudulent representations of the defendant, on which plaintiff relied, he delivered to defendant stocks which the latter appropriated to his own use, and intended so to appropriate when he made the false representations, states a cause of action for fraud and deceit.<sup>553</sup>

**§ 109. Effect of Representations in Actually Deceiving Party.**—To warrant relief by rescission on the ground of false representations, it is essential that the party complaining should have been actually deceived or misled by them. If he knew the truth of the matter, and so knew that the representations were false or incorrect, and nevertheless accepted the bargain proposed, he cannot have relief against the injurious consequences of his voluntary and intelligent assent to it.<sup>554</sup> One of the fundamental principles

<sup>550</sup> *Henry v. Dennis*, 95 Me. 24, 49 Atl. 58, 85 Am. St. Rep. 365.

<sup>551</sup> *Butterfield v. Barber*, 20 R. I. 99, 37 Atl. 532.

<sup>552</sup> *Thorp v. Smith*, 18 Wash. 277, 51 Pac. 381.

<sup>553</sup> *Maxwell v. Martin*, 130 App. Div. 80, 114 N. Y. Supp. 349.

<sup>554</sup> *Maxon-Nowlin Co. v. Norswing*, 168 Cal. 509, 137 Pac. 240; *Harper v. Cincinnati, N. O. & T. P. Ry. Co.*, 15 Ky. Law Rep. 223, 22 S. W. 849; *Daab v. New York Cent. & H. R. R. Co.*, 70 N. J. Eq. 489, 62 Atl. 449; *Lane v. Fenn*, 65 Misc. Rep. 336, 120 N. Y. Supp. 237; *Phipps v. Buckman*, 30 Pa. 401; *Dube v. Dixon*, 27 R. I. 114, 60 Atl. 834; *Bonzer v. Garrett* (Tex. Civ. App.) 162 S. W. 934; *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387; *Miles v. Pike Min. Co.*, 124 Wis. 278, 102 N. W. 555. And see *Gratz v. Schuler*, 25 Cal. App.

in regard to fraudulent representations is that the false statement must be believed by the party to whom addressed, otherwise, however false or however fraudulent the intent, the false statement does not constitute any ground for the rescission of a contract.<sup>555</sup> For instance, while it is a rule that, in the sale of personal property, a misrepresentation of a material fact by the vendor, on which the purchaser relies as an inducement to the contract, constitutes a fraud available as a defense to an action for the purchase money, still in such a transaction the purchaser cannot refuse to consult his own knowledge of the condition of the subject-matter of the sale and purchase; and if, in the sale of an interest in a mercantile business, the purchaser, by reason of his familiarity with the condition of the business he is purchasing, knows the statements made by the vendor as inducements to the contract to be false, or has reason to believe they are untrue, and no deception is practised so as to mislead him from consulting his own knowledge of its conditions, the purchaser cannot claim to be deceived, and the misrepresentations do not constitute such a fraud as will be available to him in defense of an action to recover the purchase money.<sup>556</sup> So, a contract for the sale of a machine cannot be rescinded on account of the seller's false representations as to the amount and kind of work it will do, where the purchaser has had it in his possession and has been using it for several months before the sale, and so must know its capacity.<sup>557</sup> A similar rule was applied in a case where a married woman, in whose name a deed of property had been placed on the purchase thereof by her husband, she having furnished part of the money, died childless and intestate, and the plaintiffs, inheriting an interest in her property, after having fully explained to them the manner in which she acquired the property, each executed quitclaim deeds of their interest to her husband, after obtaining the advice of other relatives. It was held,

117, 142 Pac. 899; *De Grasse v. Verona Mln. Co.* (Mich.) 152 N. W. 242; *Hayes v. Sheffield Ice Co.* (Mo. App.) 168 S. W. 294.

<sup>555</sup> *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. El. 39.

<sup>556</sup> *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355.

<sup>557</sup> *Troy Laundry Machinery Co. v. Drivers' Independent Laundry Co.*, 14 Cal. App. 152, 111 Pac. 121.

on proceedings to cancel the deeds, that the execution thereof was not obtained by the fraud or false representations of the husband, and hence they were not subject to cancellation on that ground.<sup>558</sup> And so, where a contract is made for the sale of land, and the vendees know that the vendor's title thereto is a receiver's receipt issued after a protest had been filed in the local land office, they cannot allege fraudulent misrepresentations as to such title as a ground for rescission of the contract, or as a defense against an action for the purchase money.<sup>559</sup>

**§ 110. Reliance Upon Representations.**—A contract or obligation cannot be rescinded on the ground of false or fraudulent representations unless it is shown that the party to whom they were made placed his reliance upon them, that is, believed in their accuracy and depended on their correctness, and on the strength of his dependence upon them entered into an engagement or assumed an obligation which otherwise he would have avoided.<sup>560</sup> In an

<sup>558</sup> *Johnson v. Franklin*, 58 S. C. 394, 36 S. E. 664.

<sup>559</sup> *Godding v. Decker*, 3 Colo. App. 198, 32 Pac. 832.

<sup>560</sup> *King v. Lamborn*, 186 Fed. 21, 108 C. C. A. 123; *Chemical Bank v. Lyons* (C. C.) 137 Fed. 976; *Sullivan v. Pierce*, 125 Fed. 104, 60 C. C. A. 148; *McCaskill v. Scotch Lumber Co.*, 152 Ala. 349, 44 South. 405; *Hockensmith v. Winton*, 11 Ala. App. 670, 66 South. 954; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Arkadelphia Lumber Co. v. Thornton*, 83 Ark. 403, 104 S. W. 169; *Ryan v. Batchelor*, 95 Ark. 375, 129 S. W. 787; *Spinks v. Clark*, 147 Cal. 439, 82 Pac. 45; *Hutchason v. Spinks*, 3 Cal. App. 291, 85 Pac. 132; *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Boyce v. Watson*, 20 Ga. 517; *Griffin v. Griffin*, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866; *Thomson v. McLaughlin*, 13 Ga. App. 334, 79 S. E. 182; *Bawden v. Taylor*, 254 Ill. 464, 98 N. E. 941; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, 106 Am. St. Rep. 170; *Hale Elevator Co. v. Hale*, 201 Ill. 131, 66 N. E. 249; *Imperial Safe Deposit Co. v. University of Chicago*, 187 Ill. App. 229; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Wesselhoeft v. Schanze*, 153 Ill. App. 443; *Potter v. Gibson*, 184 Ill. App. 112; *Bowman v. Carithers*, 40 Ind. 90; *Kain v. Rinker*, 1 Ind. App. 86, 27 N. E. 328; *Ross v. Hobson*, 131 Ind. 166, 26 N. E. 775; *Crouch v. Chamness*, 21 Ind. App. 492, 51 N. E. 941; *Church v. Baumgardner*, 46 Ind. App. 570, 92 N. E. 7; *John Blaul & Sons v. Wandel*, 137 Iowa, 301, 114 N. W. 899; *Evans v. Palmer*, 137 Iowa, 425, 114 N. W. 912; *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498, 1 Ann. Cas. 906; *Youle v. Fosha*, 76 Kan. 20, 90 Pac. 1090; *Frank v. Lacey*, 3 Ky. Law Rep. 335; *Salyer v. Salyer*, 141 Ky. 648, 133 S. W. 556; *Reynolds v. Evans*, 123 Md. 365, 91 Atl. 564; *Hamilton*

English case it was said: "Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied upon by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."<sup>501</sup> But it is not always

*v. Billingsley*, 37 Mich. 107; *Kimble v. Gillard*, 177 Mich. 250, 143 N. W. 79; *Kost v. Bender*, 25 Mich. 515; *Priest v. White*, 89 Mo. 609, 1 S. W. 361; *Shearer v. Hill*, 125 Mo. App. 375, 102 S. W. 673; *Williamson v. Harris*, 167 Mo. App. 347, 151 S. W. 500; *Birch Tree State Bank v. Dowler*, 167 Mo. App. 373, 151 S. W. 784; *McLennon v. Siebel*, 135 Mo. App. 261, 115 S. W. 484; *Spencer v. Hersam*, 31 Mont. 120, 77 Pac. 418; *Korbel v. Skocpol*, 70 Neb. 45, 96 N. W. 1022; *Murphey v. Illinois Trust & Sav. Bank*, 57 Neb. 519, 77 N. W. 1102; *Griswold v. Hazels*, 52 Neb. 64, 71 N. W. 972; *Jakway v. Proudft*, 76 Neb. 62, 106 N. W. 1039, 109 N. W. 388, 14 Ann. Cas. 258; *Gray v. Bowman* (N. J. Ch.) 14 Atl. 905; *Powell v. F. C. Linde Co.*, 171 N. Y. 675, 64 N. E. 1125; *Schoeneman v. Chamberlin*, 37 App. Div. 628, 55 N. Y. Supp. 845; *Dresser v. Mercantile Trust Co.*, 124 App. Div. 891, 108 N. Y. Supp. 577; *Leavitt v. Rosenthal* (Sup.) 84 N. Y. Supp. 530; *Clark v. East Lake Lumber Co.*, 158 N. C. 139, 73 S. E. 793; *Tarault v. Seip*, 158 N. C. 363, 74 S. E. 3; *Marshall-McCartney Co. v. Halloran*, 15 N. D. 71, 106 N. W. 293; *Southard v. Arkansas Valley & W. Ry. Co.*, 24 Okl. 408, 103 Pac. 750; *Horrell v. Manning*, 6 Or. 413; *David v. Moore*, 46 Or. 148, 79 Pac. 415; *Devlin v. Moore*, 64 Or. 433, 130 Pac. 35; *Ackman v. Jaster*, 179 Pa. 463, 36 Atl. 324; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497; *Bonzer v. Garrett* (Tex. Civ. App.) 162 S. W. 934; *Max Meadows Land & Improvement Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Jordan v. Walker*, 115 Va. 109, 78 S. E. 643; *Stalnaker v. Janes*, 68 W. Va. 176, 69 S. E. 651; *Home Gas Co. v. Mannington Co-op. Window Glass Co.*, 63 W. Va. 266, 61 S. E. 329; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505; *Wolff v. Carstens*, 148 Wis. 178, 134 N. W. 400; *Risch v. Von Lillenthal*, 34 Wis. 250.

<sup>501</sup> *Clapham v. Shillito*, 7 Beav. 149. And see *Aitken v. Bjerkvig* (Or.) 150 Pac. 278; *Keller v. Roetting* (W. Va.) 82 S. E. 755.

necessary to show that the complaining party knew the truth of the matter, or could have ascertained it, in order to negative the idea of his having relied on the representations made to him. Thus, for instance, where a buyer, after having refused a consignment of crockery because of defects, offered a fixed price at which he would take the goods "and take his chances," it was held that he could not have relief because representations made to him concerning the quality of the goods proved inaccurate.<sup>562</sup> And if credit is extended to one who makes false representations concerning the extent and value of his business, but it appears that no reliance was placed on these statements, but that the credit was given on the strength of his habit of paying monthly accounts promptly, the false representations afford no basis for relief.<sup>563</sup> And so, a seller of goods who relies entirely on a guaranty of payment made by his salesman, has no right of action to recover the goods on the ground of false representations made by the buyer to the salesman.<sup>564</sup> And in general, a written instrument cannot be rescinded for fraud when it appears that the consent of the complaining party would have been given, and the contract entered into, if the fact misrepresented had been truthfully stated.<sup>565</sup> And naturally no one can claim to have relied on representations of which he is not shown to have had any knowledge. Thus, on the sale of a chattel at auction, though the auctioneer may have made false statements concerning it, this will afford no ground of relief to a buyer who did not hear what the auctioneer said.<sup>566</sup> And although one may have made false representations to a mercantile agency to obtain a rating, yet if they never came to the knowledge of one who sold him goods, the latter cannot obtain relief on that ground.<sup>567</sup>

<sup>562</sup> *Vodrey Pottery Co. v. H. E. Horne Co.*, 117 Wis. 1, 93 N. W. 823.

<sup>563</sup> *Phillips v. Hebden*, 28 R. I. 1, 65 Atl. 266.

<sup>564</sup> *Moore v. Watson*, 20 R. I. 495, 40 Atl. 345.

<sup>565</sup> *Greenawalt v. Rogers*, 151 Cal. 630, 91 Pac. 526.

<sup>566</sup> *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678.

<sup>567</sup> *Tindle v. Birkett*, 57 App. Div. 450, 67 N. Y. Supp. 1017. But see this case on appeal, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822.

The theory that one relied on representations made to him is completely contradicted by showing that he knew the actual truth about the fact or condition referred to, and hence could neither have been deceived by the misrepresentation nor have placed any dependence upon it.<sup>568</sup> Thus, a purchaser of real estate cannot base an action of deceit on false statements made to him by agents for the sale of the property, concerning a material fact, where, before the sale was consummated, the owner of the property told him the true condition.<sup>569</sup> The rule is the same where the party claiming to have been defrauded is shown to have made an investigation of the subject-matter of the contract, or a personal inspection or examination of the property contracted for. In this case, the fact is immaterial that false representations were made to him on the subject. For the presumption arises that he relied and acted, not on the representations, but on his own judgment as based on the facts disclosed by his investigation or examination.<sup>570</sup> This principle was applied in a case where an action to foreclose a mortgage given for part of the purchase price of a mining property was defended on the ground that the sale was induced by the fraudulent representations of the plaintiff. It was shown that, before completing the purchase, the defendant, accompanied by an experienced miner, spent several days in examining the mine; that he afterwards stated that he bought on his own judgment and that of his expert; that after the purchase he surveyed and worked the mine for nearly two years before executing the mortgage, and

<sup>568</sup> *Richardson v. Walton* (C. C.) 49 Fed. 888; *Columbian Equipment Co. v. Highland Ave. & B. R. Co.* (C. C.) 74 Fed. 920; *Crans v. Durdall*, 154 Iowa, 468, 134 N. W. 1086; *Van Cleve v. Radford*, 149 Mich. 106, 112 N. W. 754; *Bailey v. Frazier*, 62 Or. 142, 124 Pac. 643; *Martin v. Eagle Development Co.*, 41 Or. 448, 69 Pac. 216; *Wright v. United States Mortgage Co.* (Tex. Civ. App.) 42 S. W. 1026.

<sup>569</sup> *Aldrich v. Scribner*, 146 Mich. 609, 109 N. W. 1121.

<sup>570</sup> *Bradley v. Ovlatt*, 86 Conn. 63, 84 Atl. 321, 42 L. R. A. (N. S.) 828; *Austin Powder Co. v. Courcey*, 175 Ill. App. 494; *Silvius v. Deremore*, 151 Iowa, 104, 130 N. W. 810; *Ransler v. Dwyer*, 149 Mich. 487, 112 N. W. 1120; *Freeman v. F. H. Harbaugh Co.*, 114 Minn. 283, 130 N. W. 1110; *Noble v. Buddy*, 160 Mo. App. 318, 142 S. W. 436; *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299. And see *infra*, § 121.

made no complaints of the mine till threatened with foreclosure. It was held that the evidence justified the jury in finding that the defendant, in making the purchase, did not rely on any representations made by the plaintiff.<sup>571</sup> But there must be some clear proof on this point. For instance, evidence of the purchaser's willingness to buy a secondhand machine is not inconsistent with his reliance on representations that it was serviceable and perfect.<sup>572</sup>

Nor can reliance be said to have been placed on representations concerning the subject-matter of a contract, in such sense as to entail a legal responsibility for their correctness, where it appears that the party claiming to have been injured sought and obtained information from third persons, and relied on what they told him rather than on what he learned from the other contracting party;<sup>573</sup> as, where a purchaser relies on a test of the quality of the goods made by his own agent,<sup>574</sup> or employs an attorney to investigate matters material to the contract and requiring legal knowledge for their proper comprehension,<sup>575</sup> or where a third party is called in to examine and decide on the quality and value of the subject-matter, and his decision is stated to both parties.<sup>576</sup> But if the purchaser of property has not equal means of information with the seller (in which case he generally has a right to rely on representations made to him), the evidence to show that he did not rely on the representations, but on information obtained elsewhere, must be clear and satisfactory, excluding inference and implication.<sup>577</sup> Thus, the mere fact that the plaintiff in an action of fraud, at the suggestion of the defendant, wrote to third persons inquiring about the subject of the contract under negotiation, does not show that he did not

<sup>571</sup> *Wilmer v. Smith*, 22 Or. 469, 30 Pac. 416.

<sup>572</sup> *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558.

<sup>573</sup> *Hanna v. Rayburn*, 84 Ill. 533; *Stratton's Independence v. Dines* (C. C.) 126 Fed. 968.

<sup>574</sup> *Hagee v. Grossman*, 31 Ind. 223.

<sup>575</sup> *Eppley v. Kennedy*, 131 App. Div. 1, 115 N. Y. Supp. 360; *Palmer v. Shields*, 71 Wash. 463, 128 Pac. 1051.

<sup>576</sup> *Spencer v. McLean*, 24 N. C. 93.

<sup>577</sup> *Grim v. Byrd*, 32 Grat. (Va.) 293. And see *Lembeck v. Gerken*, 86 N. J. Law, 111, 90 Atl. 698.



rely on the defendant's representations.<sup>578</sup> And a purchaser is not precluded from recovery for the fraudulent representations of the seller merely because he consulted with, or received information from, others in regard to the subject-matter, where it does not appear that the information so received was of a character to influence him in making the purchase.<sup>579</sup>

It has sometimes been held that one cannot claim to have placed his reliance on misrepresentations made to him where he is chargeable with knowledge of facts which should have aroused his suspicions or put him upon inquiry.<sup>580</sup> Thus, where a municipal warrant is void on its face, the person issuing it is not personally liable to one who buys it on his representation that it is valid.<sup>581</sup> But the better rule appears to be that one who practises bad faith will not be permitted to invoke the doctrine of constructive notice in aid of his wrongdoing, unless negligence on the part of the injured party has supervened.<sup>582</sup> And a contract may be rescinded for fraudulent misrepresentations, though the means of obtaining information were fully open to the party deceived, when from the circumstances he was induced to rely on the other party's representations.<sup>583</sup> But no rescission can be had on the ground of false representations where the contract itself contains a covenant or warranty covering the same matters alleged to have been misrepresented, because the taking of such a covenant shows conclusively that reliance was not placed on the representations.<sup>584</sup> Thus, the purchaser of a patent right cannot rescind the sale on the ground of false representations that the patent was valid and did not interfere with any prior patent, when the contract of sale contains an express warranty to the same effect, and an engagement on the part of the grantor to defend at his own

<sup>578</sup> *Cabaness v. Holland*, 19 Tex. Civ. App. 383, 47 S. W. 379.

<sup>579</sup> *Neher v. Hansen*, 12 Cal. App. 370, 107 Pac. 565.

<sup>580</sup> *Pence v. Young*, 22 Ind. App. 427, 53 N. E. 1060.

<sup>581</sup> *First Nat. Bank v. Osborne*, 18 Ind. App. 442, 48 N. E. 256.

<sup>582</sup> *Adriaans v. Dill*, 37 App. D. C. 59.

<sup>583</sup> *Engeman v. Taylor*, 46 W. Va. 669, 33 S. E. 922.

<sup>584</sup> *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116.

expense all suits for infringement.<sup>585</sup> But on the other hand, a refusal by the vendor to warrant the quantity or quality of the property sold is not inconsistent with liability for false representations in these respects.<sup>586</sup>

It was held in a few early cases that false representations would not warrant the rescission of a contract unless it was shown that the injured party relied upon them solely and exclusively.<sup>587</sup> But the modern and better rule is that relief should not be refused because it is shown that the party made inquiries in other directions and relied partly on what he thus learned, or exercised his own judgment to some extent, if it also appears that he also relied substantially on the representations made to him, and to such an extent that he would not otherwise have entered into the contract.<sup>588</sup> And it is immaterial whether the party relied on the representations per se, or on an express warranty of their truth.<sup>589</sup>

**§ 111. Representations as Inducement to Contract.**—To warrant the rescission of a contract or other obligation it must further be shown that the false representations complained of were the inducement to the contract, that is, that they created such an impression in the mind of the party complaining, in regard to the character or value of the subject-matter, the advantageous nature of the contract, etc., as to overcome any indecision on his part and lead or influence him into giving his consent.<sup>590</sup> This rule is illus-

<sup>585</sup> *Reeves v. Corning* (C. C.) 51 Fed. 774.

<sup>586</sup> *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447.

<sup>587</sup> *Wannell v. Kem*, 57 Mo. 478.

<sup>588</sup> *Snively v. Melxsell*, 97 Ill. App. 365; *Lewis v. Crandall*, 7 Mo. App. 564; *Meland v. Youngberg*, 124 Minn. 440, 145 N. W. 167, Ann. Cas. 1915B, 775; *Buchanan v. Burnett*, 102 Tex. 492, 119 S. W. 1141, 132 Am. St. Rep. 900; *Slack v. Bragg*, 83 Vt. 404, 76 Atl. 148. And see *Skeels v. Porter*, 165 Iowa, 255, 145 N. W. 332.

<sup>589</sup> *McRae v. Lonsby*, 130 Fed. 17, 64 C. C. A. 385.

<sup>590</sup> *King v. Lamborn*, 186 Fed. 21, 108 C. C. A. 123; *Huber v. Guggenheim* (C. C.) 89 Fed. 598; *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19; *Garbutt Lumber Co. v. Walker*, 6 Ga. App. 189, 64 S. E. 698; *Jameson's Adm'r v. Richardson*, 7 Ky. Law Rep. 610; *Davis v. Reynolds*, 107 Me. 61, 77 Atl. 409; *Harvey v. Squire*, 217 Mass. 411, 105 N. E. 355; *McNealy v. Bartlett*, 123 Mo. App. 58, 99 S. W.

trated by a case in the federal courts, where the holder of a policy of life insurance determined to surrender it and obtain its surrender value, at the same time taking a new policy. For the purpose of effecting the change, he went to the office of the agent of the company, where he was examined by the company's physician, who rejected him as an applicant for new insurance, on the ground that he had an affection of the heart. At the same time the physician told him that the disease was not in itself dangerous, and would not cause his death, though it would prevent him from obtaining insurance in any other company, and advised him to retain the policy he then had. But the insured surrendered the policy, and he and his wife, who was the beneficiary, executed a release thereon. In fact, his disease, as the physician knew, was likely to cause his death at any time, and did so within a few days thereafter. It was held that the wife could not avoid the release because of the false statements made by the physician, which were not the inducement to its execution, nor intended to be so, although, if the physician had stated the truth within his knowledge, it might have prevented the surrender of the policy.<sup>591</sup> For the same reason, where false statements are made concerning the subject of a contract, but the party's real reason for entering into it is the desire to avoid trouble, escape from an embarrassing situation, or avert threatened litigation, it cannot be said that the misrepresentations induced the contract.<sup>592</sup> So, a false statement is not fraudulent when there is no reason why it should be believed and acted on,<sup>593</sup> or where it is of so trivial a character that it cannot be believed to have affected the judgment or decision of the other party.<sup>594</sup>

767; *Henn v. Douglass*, 147 App. Div. 473, 131 N. Y. Supp. 810; *Whitmire v. Heath*, 155 N. C. 304, 71 S. E. 313; *Johnson v. Hulett*, 56 Tex. Civ. App. 11, 120 S. W. 257; *Camp v. Smith* (Tex. Civ. App.) 166 S. W. 22. And see Civ. Code Ga. 1910, § 4113.

<sup>591</sup> *Wagner v. National Life Ins. Co.*, 90 Fed. 395, 33 C. C. A. 121.

<sup>592</sup> *Quigley v. Quigley* (Iowa) 115 N. W. 1112; *Bowman v. Carithers*, 40 Ind. 90.

<sup>593</sup> *Branan v. Warfield*, 3 Ga. App. 586, 60 S. E. 325.

<sup>594</sup> *Garrison v. Technic Electrical Works*, 63 N. J. Eq. 806, 52 Atl. 1131.

A conclusive test of the misrepresentations being the inducement to the contract is the fact (if it be so) that the party would have refused his consent if the representations had not been made or if he had known the truth.<sup>595</sup> But this is a mental state, and naturally not susceptible of exact proof. Nor is it always required to be proved to the fullest extent. In some of the cases it is held enough to show that the party might not have entered into the contract but for the representations,<sup>596</sup> or that a finding that a contract to purchase land was induced solely through false representations is sufficient without a finding that the plaintiff's consent would not have been given but for such representations.<sup>597</sup> And one very advanced decision is to the effect that fraudulent representations constituting a material inducement to a contract are actionable, even though the transaction would have taken place if they had not been made.<sup>598</sup>

It is not necessary that the misrepresentations complained of should have been the sole or exclusive cause of the contract, if they were proximate, immediate, and material, that is to say, if they materially influenced the conduct of the party it is enough, although they were not the sole or even the predominant inducement, but only contributed to sway his decision and induce his consent.<sup>599</sup> Thus, for ex-

<sup>595</sup> *Diamond v. Shriver*, 114 Md. 643, 80 Atl. 217; *Stoker v. Fugitt* (Tex. Civ. App.) 113 S. W. 310; *Nearing v. Hathaway*, 128 App. Div. 745, 113 N. Y. Supp. 318.

<sup>596</sup> *Atlantic Trust & Deposit Co. v. Union Trust & Title Corporation*, 110 Va. 286, 67 S. E. 182, 135 Am. St. Rep. 937.

<sup>597</sup> *Royal v. Lange*, 15 Cal. App. 724, 115 Pac. 750.

<sup>598</sup> *Darlington v. J. L. Gates Land Co.*, 151 Wis. 461, 138 N. W. 72, 139 N. W. 447. And see *Guild v. More* (N. D.) 155 N. W. 44.

<sup>599</sup> *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *In re Gany* (D. C.) 103 Fed. 930; *Rice v. Gilbreath*, 119 Ala. 424, 24 South. 421; *MacDonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73; *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Skeels v. Porter*, 165 Iowa, 255, 145 N. W. 332; *Baker v. Mathew*, 137 Iowa, 410, 115 N. W. 15; *Kelty v. McPeake*, 143 Iowa, 567, 121 N. W. 529; *Matthews v. Bliss*, 22 Pick. (Mass.) 48; *Safford v. Grout*, 120 Mass. 20; *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799; *Burnham v. Ellmore*, 66 Mo. App. 617; *American Hardwood Lumber Co. v. Dent*, 121 Mo. App. 108, 98 S. W. 814; *Laska v. Harris*, 215 N. Y. 554, 109 N. E. 599; *State v. Merry*, 20 N. D. 337, 127 N. W. 83; *Handy v. Waldron*, 19 R. I. 618, 35 Atl.

ample, where the controlling considerations which induced the plaintiff to act were the defendant's fraudulent representations regarding existing facts, plaintiff is entitled to recover his damages, notwithstanding he may also have been influenced by defendant's false promises as to future transactions.<sup>600</sup> So, where some of the representations made by a vendee in procuring a deed to land are true, and some are false and sufficient to set aside the sale, and it appears that the latter might and did influence the vendor in the disposition of the land, the sale should be canceled.<sup>601</sup> And a false and fraudulent statement inducing the plaintiff to invest in more stock of a corporation is actionable, although he had previously invested money in the stock of the same company.<sup>602</sup> Finally, it is held that, where a seller has made a false representation which from its nature might induce the buyer to enter into a contract of purchase, it will be inferred that the buyer was induced thereby to contract, and it does not rest with him to show that he in fact relied on the representation.<sup>603</sup>

**§ 112. Necessity of Actual Loss or Injury.**—In an action for deceit or to recover damages for fraud, or in a case where fraudulent representations are set up as a defense to an action on the contract, there can be no recovery (or the defense cannot prevail) unless the party claiming to have been defrauded shows that he has suffered some appreciable loss, damage, or injury, directly in consequence of the misrepresentations.<sup>604</sup> Thus, for example, giving a check on

884; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188. Compare *Nau-man v. Oberle*, 90 Mo. 666, 3 S. W. 380.

<sup>600</sup> *Damers v. Sternberger*, 52 Misc. Rep. 532, 102 N. Y. Supp. 739; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85.

<sup>601</sup> *Stackpole v. Hancock*, 40 Fla. 362, 24 South. 914, 45 L. R. A. 814.

<sup>602</sup> *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

<sup>603</sup> *Grosh v. Ivanhoe Land & Improvement Co.*, 95 Va. 161, 27 S. E. 841; *Redgrave v. Hurd*, 20 Ch. Div. 1.

<sup>604</sup> *Graham v. Peale, Peacock & Kerr*, 173 Fed. 9, 97 C. C. A. 311; *Stratton's Independence v. Dines*, 135 Fed. 449, 68 C. C. A. 161; *Pickthall v. Steinfeld*, 12 Ariz. 230, 100 Pac. 779; *Jackson & Sharp Co. v. Fay*, 20 App. D. C. 105; *Hughes v. Lockington*, 221 Ill. 571, 77 N. E. 1105; *Wesselhoeft v. Schanze*, 153 Ill. App. 443; *Srader v. Srader*, 151 Ind. 339, 51 N. E. 479; *Vogel v. Demorest*, 97 Ind. 440; *Bailey v. Oatis*, 85 Kan. 339, 116 Pac. 830; *Hunter v. Lee*, 11

a bank, with the implied representation that it will be paid on presentation, which is dishonored, will not furnish ground for an action of fraud, where it was given in payment for goods sold and delivered long before, and no property was parted with in reliance on anything said or done at the time the check was given.<sup>605</sup> So, false representations by an owner of property which induced a materialman to refrain from filing a lien, when at the time no lien could be created, do not create a liability.<sup>606</sup> And where a husband alone conveyed land, with a covenant against incumbrances, a subsequent grantee, in procuring the execution of a quitclaim deed by husband and wife, was not guilty of fraud, as against the husband, because he concealed and misrepresented to him the increased value of the land, since the husband was bound by his covenant to procure a release of the wife's dower.<sup>607</sup> And a fraudulent representation made to a vendee that a mortgage on the land only drew six per cent interest, when the mortgage on its face was in excess thereof, cannot be said to have worked injury to the vendee where he could deduct from the deferred payments the amount of excess interest.<sup>608</sup> So again, an administra-

Kan. 292; *Stevens v. Odlin*, 109 Me. 417, 84 Atl. 899; *Brackett v. Perry*, 201 Mass. 502, 87 N. E. 903; *Trayne v. Boardman*, 207 Mass. 581, 93 N. E. 846; *Fottler v. Moseley*, 179 Mass. 295, 60 N. E. 788; *Morgan v. Bliss*, 2 Mass. 111; *Emerson v. Brigham*, 10 Mass. 199, 6 Am. Dec. 109; *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557; *Rhodes v. Dickerson*, 95 Mo. App. 395, 69 S. W. 47; *Mix v. Charles P. Boland Co.*, 153 App. Div. 435, 138 N. Y. Supp. 361; *Badger v. Pond*, 120 App. Div. 619, 105 N. Y. Supp. 546; *Tregner v. Hazen*, 116 App. Div. 829, 102 N. Y. Supp. 139; *Eames v. Brunswick Const. Co.*, 104 App. Div. 568, 94 N. Y. Supp. 24; *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026; *Nelson v. Grondahl*, 12 N. D. 130, 96 N. W. 299; *Lake v. Webber*, 6 Pa. Super. Ct. 42; *Farmer v. Lynch* (R. I.) 67 Atl. 449; *Caffall v. Bandera Telephone Co.* (Tex. Civ. App.) 136 S. W. 105; *Buckingham v. Thompson* (Tex. Civ. App.) 135 S. W. 652; *Shoemaker v. Cake*, 83 Va. 1, 1 S. E. 387; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787; *Brown v. Ocean Accident & Guarantee Corp.*, 153 Wis. 196, 140 N. W. 1112. Compare *Blumenfeld v. Stine*, 42 Misc. Rep. 411, 87 N. Y. Supp. 81. See, also, *Kuper v. Sneathen*, 96 Neb. 34, 146 N. W. 991; *Dunn & McCarthy v. Bishop* (R. I.) 90 Atl. 1073; *Bonzer v. Garrett* (Tex. Civ. App.) 162 S. W. 934.

<sup>605</sup> *Goldstein v. Messing* (Sup.) 104 N. Y. Supp. 724.

<sup>606</sup> *Kuteman v. Lacy* (Tex. Civ. App.) 144 S. W. 1184.

<sup>607</sup> *Crowley v. C. N. Nelson Lumber Co.*, 66 Minn. 400, 69 N. W. 321.

<sup>608</sup> *Winkler v. Jerrue*, 20 Cal. App. 555, 129 Pac. 804.

tor, suing a railroad company for damages for false representations made to him by the company's claim agent, inducing a settlement of his claim against the company for causing the death of the intestate, must show that he had a valid and existing claim against the company originally, and it is not sufficient to show that there was a claim which was disputed and contested and that he could reasonably apprehend that he had a just claim.<sup>609</sup> But while deceit merely inducing one to make an executory contract may not be complained of, if nothing is done under the contract, so that there is no damage, yet if the deceit does not end in the making of the contract, but further influences a party to the contract in his conduct under it, it is a continuing deceit, of which such party, injured by the execution or partial execution of the contract, may complain.<sup>610</sup>

Not only must there be an actual and appreciable loss or injury, but it must be clearly shown to have occurred or to be inevitable. A mere conjecture or surmise that loss or injury may ensue is not what the law requires.<sup>611</sup> This being established, however, any substantial loss or injury, whether pecuniary or otherwise, will give a right of action. For instance, an inchoate right of dower is a valuable right in property, for which a married woman, who is induced to release the same by fraudulent misrepresentations, may recover damages.<sup>612</sup> And for the purpose of supporting an action of deceit, refraining from action, to the plaintiff's loss, in reliance on false representations, is in legal effect acting on the falsehood; so that it makes no difference whether the plaintiff has been fraudulently induced to buy property or to refrain from selling it.<sup>613</sup> Nor is it necessary that the injury should be pecuniary. Thus, where the plaintiff was injured by defendant's false representations con-

<sup>609</sup> *Urtz v. New York Cent. & H. R. R. Co.*, 202 N. Y. 170, 95 N. E. 711.

<sup>610</sup> *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125.

<sup>611</sup> *Taylor v. Scoville*, 54 Barb. (N. Y.) 34; *Townsend v. Felt-housen*, 156 N. Y. 618, 51 N. E. 279; *Martin v. Clark*, 19 App. Div. 496, 46 N. Y. Supp. 616.

<sup>612</sup> *Garry v. Garry*, 187 Mass. 62, 72 N. E. 335.

<sup>613</sup> *Fottler v. Moseley*, 179 Mass. 295, 60 N. E. 788.



cerning his ability to cure plaintiff of a disease by the use of certain remedies, by which plaintiff was injured, an action of deceit will lie although no money was paid to the defendant.<sup>614</sup> But a buyer of property cannot recover damages for fraudulent representations inducing him to make the purchase, when the price he paid was no more than the actual value of the property.<sup>615</sup> On the other hand, the essential thing is loss to the plaintiff and not gain to the defendant; and if loss or injury is proved, it is immaterial whether or not the defendant received anything of value from the plaintiff, or derived any benefit or advantage from the deceit practised by him.<sup>616</sup>

It is also necessary to allege and show that the false or fraudulent representations were the direct and immediate cause of the loss or injury sustained by the plaintiff.<sup>617</sup> For instance, where plaintiff traded farms with defendant, relying on the latter's representation that a mortgage on his farm, which plaintiff assumed, could lie for ten years if plaintiff kept the interest paid, which was not done, and the mortgage was foreclosed, and plaintiff brought an action for damages for fraud, it was held that there could be no recovery, as it did not appear that the foreclosure was due to a breach of the representation.<sup>618</sup>

The foregoing rules and principles, as we have stated, are those which apply in an action of deceit or other similar action. Many decisions have applied them equally in cases

<sup>614</sup> *Flaherty v. Till*, 119 Minn. 191, 137 N. W. 815.

<sup>615</sup> *Pitts v. Kennedy* (Tex. Civ. App.) 177 S. W. 1016; *Snyder v. Hegan*, 19 Ky. Law Rep. 517, 40 S. W. 693; *Thompson v. Newell*, 118 Mo. App. 405, 94 S. W. 557. But the mere fact that the person defrauded in the purchase of property, by being deceived as to the true purchase price which he was required to pay therefor, subsequently sells such property at a profit, does not defeat his cause of action for the original deceit. *Hinton v. Ring*, 111 Ill. App. 369.

<sup>616</sup> *Leonard v. Springer*, 174 Ill. App. 516; *Flaherty v. Till*, 119 Minn. 191, 137 N. W. 815; *Skeels v. Porter*, 165 Iowa, 255, 145 N. W. 332; *Spencer v. Taggart*, 162 Iowa, 564, 144 N. W. 299; *Lafayette Street Church Society v. Norton*, 159 App. Div. 1, 144 N. Y. Supp. 265.

<sup>617</sup> *Morgan v. Hodge*, 145 Wis. 143, 129 N. W. 1083; *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723; *Clark v. East Lake Lumber Co.*, 158 N. C. 139, 73 S. E. 793; *Walsh v. Paine*, 123 Minn. 185, 143 N. W. 718.

<sup>618</sup> *Alletson v. Powers*, 72 Vt. 417, 48 Atl. 647.

where the relief sought was the rescission of a contract, or the setting aside or cancellation of a conveyance or other obligation, holding that such relief cannot be granted unless it is shown that the party defrauded has suffered some actual loss or injury in direct consequence of the fraud.<sup>619</sup> For instance, where defendant contracted in writing to deliver a certain quantity of pecans at a specified time, place, and price, a plea that he was induced to enter into such contract by means of fraudulent representations that the pecan crop was good in the adjacent territory, while in fact it was a failure, is insufficient where it is not alleged that by reason of such failure it would have cost more to fill the contract.<sup>620</sup> So, where no dispossession has taken place and none seems probable, a representation by the person executing a lease as lessor that he was the owner of the premises demised, when in fact his wife owned the same, will not entitle the lessee to cancel the lease in equity.<sup>621</sup> So, where the stockholders of a corporation all surrender a like percentage of their stock at less than its actual value, one induced to make such surrender by fraudulent representations suffers no actionable wrong.<sup>622</sup> And generally it may be said that one who is induced by false representations to do an act which it is his duty to do cannot be heard to say that he was prejudiced by such fraud.<sup>623</sup> Thus, one who

<sup>619</sup> *Farwell v. Colonial Trust Co.*, 147 Fed. 480, 78 C. C. A. 22; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Purdy v. Bullard*, 41 Cal. 444; *Robert v. Finberg*, 85 Conn. 557, 84 Atl. 366; *Austell v. Rice*, 5 Ga. 472; *Bowen v. Waxelbaum*, 2 Ga. App. 521, 58 S. E. 784; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Quigley v. Quigley (Iowa)* 115 N. W. 1112; *Ranstead v. Allen*, 85 Md. 462, 37 Atl. 15; *Russell v. Carman*, 114 Md. 25, 78 Atl. 903; *Harris v. Ransom*, 24 Miss. 504; *Lindsay v. Kroeger*, 37 Mont. 231, 95 Pac. 839; *Fitchett v. Henley*, 31 Nev. 326, 102 Pac. 865, 104 Pac. 1060; *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 Hun, 248, 32 N. Y. Supp. 697; *Pappademetriou v. Bouboulis (Sup.)* 134 N. Y. Supp. 183; *Lockwood v. Allen*, 113 Wis. 474, 89 N. W. 492; *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97; *Lams v. Fish (N. J.)* 90 Atl. 1105; *Leonard v. King (Tex. Civ. App.)* 164 S. W. 1110.

<sup>620</sup> *Hopkins v. Woldert Grocery Co. (Tex. Civ. App.)* 66 S. W. 63.

<sup>621</sup> *Hock v. Jorgeson*, 137 Ill. App. 199.

<sup>622</sup> *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 80 N. W. 88, 81 N. W. 118.

<sup>623</sup> *Musconetcong Iron Works v. Delaware, L. & W. R. Co.*, 78 N. J. Law, 717, 76 Atl. 971, 20 Ann. Cas. 178.

has entered into a valid and binding contract to give his note for a certain amount, and subsequently gives it, cannot defend against it on the ground that its execution was procured by fraud or false representations.<sup>624</sup>

But many other decisions repudiate altogether the rule requiring a showing of actual damage, in so far as it applies to the rescission of contracts. Admitting the necessity of such a showing where the action is in tort, they yet maintain that misrepresentations made willfully with intent to deceive and to induce one to enter into a contract which he would not otherwise have made furnish ground for its rescission, irrespective of the question whether or not the complaining party has sustained any loss, injury, or damage.<sup>625</sup> For instance, where a person is induced to buy furniture by false representations that the seller is not a secondhand dealer, but is disposing of his own personal furniture which has never been used by anyone else, he may rescind, even though such representations do not affect the actual value of the furniture.<sup>626</sup>

The soundest reason, however, appears to support those decisions which discriminate between cases where the deception is as to the identity or character of the subject-matter and those where the deception concerns some collateral matter, and which hold that there must be proof of loss or injury in the latter class of cases, but not in the former. Thus, it is said that where a purchaser of property has been deceived by the false and fraudulent representations of the vendor, it is no obstacle to his right to rescind

<sup>624</sup> *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S. E. 997.

<sup>625</sup> *King v. Lamborn*, 186 Fed. 21, 108 C. C. A. 123; *Wainscott v. Occidental B. & L. Ass'n*, 98 Cal. 253, 33 Pac. 88; *Felt v. Bell*, 205 Ill. 213, 68 N. E. 794; *Turner v. Keel*, 165 Ill. App. 288; *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049; *Higbee v. Trumbauer*, 112 Iowa, 74, 83 N. W. 812; *Barnes v. Century Savings Bank*, 149 Iowa, 367, 128 N. W. 541; *MacLaren v. Cochran*, 44 Minn. 255, 46 N. W. 408; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *Ludowese v. Amidon*, 124 Minn. 288, 144 N. W. 965; *Fisher v. Seltz*, 172 Mo. App. 162, 157 S. W. 883; *Harlow v. La Brum*, 151 N. Y. 278, 45 N. E. 859; *Rose v. Merchants' Trust Co. (Sup.)* 96 N. Y. Supp. 946; *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618; *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678.

<sup>626</sup> *Vaiden v. Rudolph (Sup.)* 145 N. Y. Supp. 55. And see *Kanaman v. Hubbard (Tex. Civ. App.)* 160 S. W. 304.

that, in spite of all, he has secured good value for his money or that he is not likely to suffer any loss. "In an action of deceit, no doubt, this would be relevant on the question of damages, in order to show that there were none, although to this the authorities are not all agreed, but not so upon a bill to rescind. The purchaser is entitled to the bargain which he supposed and was led to believe he was getting, and is not to be put off with any other, however good."<sup>627</sup> A purchaser of personalty is entitled to receive the identical property purchased, and where the vendor by fraud has conveyed to him or induced him to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid without showing any pecuniary damage.<sup>628</sup> Thus, the sale of a horse, induced by fraud, may be rescinded, notwithstanding the horse may be worth what was agreed to be paid for him, as the buyer is entitled to such a horse as the seller represented him to be.<sup>629</sup> So again, a person cannot, with intention to mislead a purchaser by deceiving him concerning facts of which he is ignorant, sell him land for one purpose, and then, in a suit in equity brought to annul the transaction by reason of such fraud, defend on the ground that, while he knowingly deceived the purchaser in the manner claimed, the latter will lose nothing if he will avail himself of the land for some other or different purpose designated by the grantor.<sup>630</sup> So, where a purchaser has contracted for first-class farming land, which will not overflow, he has a right to refuse to take overflowed lands, no matter what they might produce.<sup>631</sup> In another case, where plaintiff brought suit to set aside a sale for fraudulent representations of the defendant as to the condition of the business sold at the time the sale was made, the fact that plaintiff was incompetent to manage the business successfully was held to constitute no

<sup>627</sup> *Mather v. Barnes* (C. C.) 146 Fed. 1000; *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047; *Brett v. Cooney*, 75 Conn. 338, 53 Atl. 729, 1124.

<sup>628</sup> *Jakway v. Proudfit*, 76 Neb. 62, 106 N. W. 1039, 109 N. W. 388, 14 Ann. Cas. 258.

<sup>629</sup> *Fuller v. Chenault*, 157 Ala. 46, 47 South. 197.

<sup>630</sup> *Steen v. Welsten*, 51 Or. 473, 94 Pac. 834.

<sup>631</sup> *Sargent v. Barnes* (Tex. Civ. App.) 159 S. W. 366.

defense to the action.<sup>682</sup> For another illustration of this principle, we may cite the case where a plaintiff, doing business under the name of the "Committee of Distribution," sent his agent to obtain defendant's order for certain books, and the agent falsely represented and induced the defendant to believe that he was purchasing the books from a committee of the United States congress, that the books could be obtained only on the recommendation of a congressman, and that he had been recommended by the congressman from his district. It was held that the defendant was under no obligation to take the books, even although they were in every respect as good as represented.<sup>683</sup>

But on the other hand, where a purchaser receives what he has actually bargained for, and bases his right to rescind on some false representation as to quality, condition, or matter affecting its value, he must show that such representation was material, that he was misled by it, and that he has thereby sustained some loss or damage.<sup>684</sup> For instance, a purchaser of a right to vend a patented article in a certain territory cannot defeat a recovery on the ground of a misrepresentation as to the number of such articles already sold in that territory, in the absence of a showing that he was injured by the false representation.<sup>685</sup> So, a purchase of a machine cannot be rescinded because of false representations that S. was the local agent of the seller and would keep repair parts for the machine, where it appears that such parts were kept by another, and it is not shown that the purchaser will suffer any loss by reason of S. not being such agent.<sup>686</sup> Again, a misrepresentation by the purchaser of property as to his own identity is not ground for rescission unless it is shown to have caused some loss

<sup>682</sup> *Jackson v. Foley*, 53 App. Div. 97, 65 N. Y. Supp. 920.

<sup>683</sup> *Barcus v. Dorries*, 64 App. Div. 109, 71 N. Y. Supp. 695.

<sup>684</sup> *Jakway v. Proudfit*, 76 Neb. 62, 106 N. W. 1039, 109 N. W. 388, 14 Ann. Cas. 258; *Gilfillen v. Moorehead*, 73 Conn. 710, 49 Atl. 196; *Donnelly v. Baltimore Trust & Guarantee Co.*, 102 Md. 1, 61 Atl. 301; *Storthz v. Arnold*, 74 Ark. 68, 84 S. W. 1036. And see *Bewley v. Moremen*, 162 Ky. 32, 171 S. W. 996.

<sup>685</sup> *Rice v. Gilbreath*, 119 Ala. 424, 24 South. 421.

<sup>686</sup> *Aultman, Miller & Co. v. Nilson*, 112 Iowa, 634, 84 N. W. 692.

or damage.<sup>637</sup> On the same principle, it is not fraud to induce a party to sign an instrument of one kind by representing it to be an instrument of another kind, where it accomplishes exactly the same result and does not work any injury to the party misled.<sup>638</sup> So, each of the subscribers to the stock of a corporation (the whole being required to be subscribed before any subscription becomes binding) has a right to rely on the genuineness and validity of the other subscriptions. But though some of them may be forged and others obtained by false pretences, yet a subscriber is not entitled to repudiate his contract, if he does not stand in danger of any actual loss or injury.<sup>639</sup> And a subscription to pay money to certain associates in consideration of their erecting a pork-packing house is not affected by contemporaneous parol misrepresentations that men of great wealth would take part and that collateral improvements would be made, when the house is erected according to the undertaking.<sup>640</sup> Furthermore, the loss or injury must be actual or inevitable, not merely conjectural. Thus, an author is not justified in his refusal to permit a publisher to publish his book, as he had contracted to do, merely because of his doubts as to the publisher's solvency.<sup>641</sup>

**§ 113. Duty to Investigate Truth of Representations.—**It is a rule of great antiquity and supported by a great body of authorities that a person about to enter into a contract or assume an obligation should exercise reasonable care and prudence in the matter of accepting at their face value representations concerning the subject-matter made to him by the opposite party; and although the representations were false and fraudulent, and he was deceived by them and misled to his injury, yet he cannot rescind or repudiate his contract on that ground, if it appears that he might have discovered their falsity by mere inspection of the subject,

<sup>637</sup> *Turchin Sheffield Plate & Sterling Silver Co. v. Baugh* (Sup.) 117 N. Y. Supp. 137.

<sup>638</sup> *Hays v. Hays*, 179 Pa. 277, 36 Atl. 311.

<sup>639</sup> *Haney & Campbell Mfg. Co. v. Adaza Co-operative Creamery Co.*, 108 Iowa, 313, 79 N. W. 79.

<sup>640</sup> *Paddock v. Bartlett*, 68 Iowa, 16, 25 N. W. 906.

<sup>641</sup> *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N. E. 1087.

or by the exercise of reasonable diligence in recurring to sources of information which were equally open to him as to the other party.<sup>642</sup> There are exceptions to this rule (which will be discussed in the succeeding sections), where a fiduciary relationship subsisted between the parties, where the matter was exclusively within the knowledge of one of them, where an examination of the subject-matter would require unusual pains, expense, or trouble, or involve spe-

<sup>642</sup> *King v. Lamborn*, 186 Fed. 21, 108 C. C. A. 123; *Great Western Mfg. Co. v. Adams*, 176 Fed. 325, 99 C. C. A. 615; *Dalhoff Const. Co. v. Block*, 157 Fed. 227, 85 C. C. A. 25, 17 L. R. A. (N. S.) 419; *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 South. 449; *Nelson v. Brown*, 164 Ala. 397, 51 South. 360, 137 Am. St. Rep. 61; *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859; *Lion v. McClory*, 106 Cal. 623, 40 Pac. 12; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275; *Gratz v. Schuler*, 25 Cal. App. 117, 142 Pac. 899; *Gustafson v. Rustemeyer*, 70 Conn. 125, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; *Stephens v. Orman*, 10 Fla. 9; *Hunt v. Hardwick*, 68 Ga. 100; *Miller v. Roberts*, 9 Ga. App. 511, 71 S. E. 927; *Nelson v. Hudgel*, 23 Idaho, 327, 130 Pac. 85; *Hand v. Waddell*, 167 Ill. 402, 47 N. E. 772; *Jones v. Foster*, 175 Ill. 459, 51 N. E. 862; *Moore v. Recek*, 163 Ill. 17, 44 N. E. 868; *Stedman v. Boone*, 49 Ind. 469; *Williamson v. Hitner*, 79 Ind. 233; *Wood v. Wack*, 31 Ind. App. 252, 67 N. E. 562; *Anderson Foundry & Machine Works v. Myers*, 15 Ind. App. 385, 44 N. E. 193; *King v. Williams*, 71 Iowa, 74, 32 N. W. 178; *Exchange Bank v. E. B. Williams & Co.*, 120 La. 901, 45 South. 935; *Rocchi v. Schwabacher*, 33 La. Ann. 1364; *Stone v. Pentecost*, 206 Mass. 505, 92 N. E. 1021; *De Grasse v. Verona Min. Co. (Mich.)* 152 N. W. 242; *Buford v. Caldwell*, 3 Mo. 477; *Champion Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050; *Brown v. Kansas City Southern Ry. Co.*, 187 Mo. App. 104, 173 S. W. 73; *Osborne v. Missouri Pac. Ry. Co.*, 71 Neb. 180, 98 N. W. 685; *Wustrack v. Hall*, 95 Neb. 384, 145 N. W. 835; *Industrial Sav. & Loan Co. v. Plummer (N. J.)* 92 Atl. 583, L. R. A. 1915C, 613; *Dambmann v. Schulting*, 75 N. Y. 55; *Creamer v. Peshkin*, 81 Misc. Rep. 167, 142 N. Y. Supp. 333; *Saunders v. Hatterman*, 24 N. C. 32, 37 Am. Dec. 404; *Waymire v. Shipley*, 52 Or. 464, 97 Pac. 807; *Wheelwright v. Vanderbilt*, 69 Or. 326, 138 Pac. 857; *Griffith v. Herr*, 17 Pa. Super. Ct. 601; *Baum v. Raley*, 53 S. C. 32, 30 S. E. 713; *Winter v. Johnson*, 27 S. D. 512, 131 N. W. 1020; *Perkins v. McGavock*, *Cooke (Tenn.)* 415; *Corbett v. McGregor (Tex. Civ. App.)* 131 S. W. 422; *Equitable Life Assur. Soc. v. Maverick (Tex. Civ. App.)* 78 S. W. 560; *Mutual Life Ins. Co. v. Hargus (Tex. Civ. App.)* 99 S. W. 580; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Francois v. Cady Land Co.*, 149 Wis. 115, 135 N. W. 484; *Morgan v. Hodge*, 145 Wis. 143, 129 N. W. 1083; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188. Compare *Maxon-Nowlin Co. v. Norswing*, 166 Cal. 509, 137 Pac. 240.



cial training or technical knowledge, and so on. But in the absence of such circumstances, the rule applies that where the subject-matter of false representations is at hand, and the truth easily ascertainable, one cannot be heard to say that he has been defrauded by such representations, if he neglected to avail himself of a present and reasonable opportunity to learn the truth.<sup>643</sup> "The misrepresentations which will vitiate a contract of sale and prevent a court of equity from aiding its enforcement must \* \* \* relate to a matter respecting which the complaining party did not possess at hand the means of knowledge. \* \* \* A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over-confidence in the statements of another."<sup>644</sup> "In determining whether the representations are mere expressions of an opinion or statements of fact as such, reference must always be had to the subject-matter to which they relate, the circumstances under which they were made, and the difference in the means of knowledge in reference to the matter between the plaintiff and defendant. If the plaintiff ought, by reasonable diligence, to have known the truth or falsity of the statements, or had equal facilities for knowing as the defendant, he cannot be blindly believing where he ought not to have believed, or trusting where

<sup>643</sup> *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Strubhar v. Shorthose*, 78 Ill. App. 394; *Mather v. Barnes* (C. C.) 146 Fed. 1000; *Civ. Code Ga.* 1910, § 4581.

<sup>644</sup> *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, 20 L. Ed. 627.

he ought not to have trusted, or, shutting his eyes where he ought to have kept them open, charge the defendant with the consequences of his folly. Every man is bound to exercise his judgment when he can do so, but when the means of forming a correct conclusion are peculiarly possessed by one, then, if that person misrepresents and deceives another to his damage, he is liable, otherwise not.”<sup>645</sup> “Fraud consists in a willful misrepresentation of facts, or in fraudulent concealment of them with a view to deceive. If a party honestly believes the representations which he makes to be true, he is guilty of no moral turpitude or legal responsibility for making them. To be guarded against injury, each of the contracting parties should inform himself of the true state of the facts, or exact a warranty from the other for his indemnity, knowing, as he should be taught by the law, that he has no redress over or discharge from his contract, unless he has been deceived into it by the willful misrepresentations or fraudulent concealment of material facts by the other contracting party.”<sup>646</sup>

This rule is not restricted to cases of sales, but applies equally to other classes of contracts. For instance, a subscriber for stock in a corporation must be deemed to know what he could have known by the exercise of reasonable diligence; and where he could have verified any of the statements inducing the subscription, and could have ascertained everything about the affairs of the corporation, he may not complain on the ground of fraud.<sup>647</sup> So, the misrepresentation to another of the contents of a writing, which both have the opportunity and ability to read, and which both sign, where the one does not fraudulently prevent the other from reading it, does not vitiate the writing.<sup>648</sup> And a representation as to the market value or current market price of a commodity which is the subject of

<sup>645</sup> 2 Add. Torts (Wood's edn.) § 1175, note.

<sup>646</sup> *Livermore v. Middlesborough Town-Lands Co.*, 106 Ky. 140, 50 S. W. 6.

<sup>647</sup> *In re American Nat. Beverage Co.* (D. C.) 193 Fed. 772.

<sup>648</sup> *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 South. 663; *United Breeders' Co. v. Wright*, 134 Mo. App. 717, 115 S. W. 470. And see, *supra*, § 52.

the bargain may not be relied on where the true figure can easily be ascertained.<sup>649</sup>

The rule applies with special force where the matter about which the person claims to have been deceived is a matter within his own personal knowledge. Thus, where an insurance company induced the insured person to settle his claim by representing that, in the application for the policy, then in the insurer's possession, the insured made false statements vitiating the policy, he has no cause of action for deceit, for he must be presumed to know whether or not he signed such a statement, and should have demanded an inspection of the application.<sup>650</sup> So the rule is closely applied in cases where the representations relate to matters which can easily be verified by mere inspection, as, where they concern the physical condition of property, its appearance, dimensions, weight, or the like,<sup>651</sup> or where an instrument or document shows on its face that it is not what it is represented to be.<sup>652</sup> So, where one about to sell a stock of goods represented to the prospective buyer that the stock was worth the invoice price, was practically new, and first-class in every respect and readily salable, and the stock was at hand and the buyer competent to examine it, it was held that the representations related to matters of judgment, concerning which the buyer was required to judge for himself.<sup>653</sup> Also there seems to be special ground for the application of this rule in cases where the party is bound, for other reasons, to be cognizant of the facts. Thus, a misrepresentation made to a board of public officers, concerning a fact which they can ascertain for themselves and which they are bound to know as pertaining to their own duties, but as to which they neglect to inform themselves, does not furnish ground for the interference of a court of equity.<sup>654</sup> And where a party places the conduct

<sup>649</sup> *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76; *Graffenstein v. Epstein*, 23 Kan. 443, 33 Am. Rep. 171.

<sup>650</sup> *Davis v. Phoenix Ins. Co.*, 81 Mo. App. 264.

<sup>651</sup> *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593.

<sup>652</sup> *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1091.

<sup>653</sup> *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

<sup>654</sup> *Churchill Tp. v. Cummings Tp.*, 51 Mich. 446, 16 N. W. 805.

of a transaction in the hands of his attorney. he cannot complain of misrepresentations as to facts which the attorney could and should have discovered.<sup>655</sup> Moreover, where representations are made in a written contract for the sale or hire of an article, but at the same time a clause is added stating that "particulars are not guaranteed," it is notice to the purchaser or hirer not to rely on the representations, but to use his own judgment or inform himself otherwise.<sup>656</sup>

A person who has taken proper precautions to guard himself against fraud or deception, by making an examination or inspection, is generally justified in relying on the situation continuing as he found it, and completing his contract on that assumption.<sup>657</sup> But this does not hold good where a partial examination of goods purchased discloses a defect (which is thereupon remedied), but the purchaser, not taking the warning, omits to make a further examination which, had he made it, would have brought to light additional defects.<sup>658</sup>

**§ 114. Same; Decisions Repudiating or Modifying Rule.**—A very great number of decisions (particularly among the later ones) altogether repudiate the rule stated in the preceding section, or else restrict it to cases where the representations were not made with any willful purpose to deceive. According to these authorities, when a party to a contract intentionally and fraudulently misrepresents or conceals facts within his knowledge, or which may be assumed to be within his knowledge, and the other relies thereon and is misled to his injury, the latter is entitled to rescind irrespective of any effort on his part to discover the truth of the matter in question, and the defrauding party will not be heard to say in defense that his victim might have discovered the truth if he had exercised due care and prudence.<sup>659</sup> "Every contracting party," says

<sup>655</sup> *Freeman v. Evans*, 159 Fed. 26, 86 C. C. A. 216.

<sup>656</sup> *The Hurstdale* (D. C.) 169 Fed. 912.

<sup>657</sup> *Nelson v. Title Trust Co.*, 52 Wash. 258, 100 Pac. 730.

<sup>658</sup> *Winelander v. Jones*, 77 Iowa, 401, 42 N. W. 333.

<sup>659</sup> *McAllister v. Barry*, Fed. Cas. No. 8,656; *Baker v. Maxwell*, 99 Ala. 558, 14 South. 468; *King v. Livingston Mfg. Co.*, 180 Ala.

the court in New York, "has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."<sup>660</sup> "There is no rule of law which requires men, in their business transactions, to act upon the presumption that all

118, 60 South. 143; Wilks v. Wilks, 176 Ala. 151, 57 South. 776; Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 Pac. 240; Vance v. Supreme Lodge of Fraternal Brotherhood, 15 Cal. App. 178, 114 Pac. 83; Whitaker v. State, 11 Ga. App. 208, 75 S. E. 258; La Salle Pressed Brick Co. v. Coe, 65 Ill. App. 619; Judy v. Jester, 53 Ind. App. 74, 100 N. E. 15; Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422; Howerton v. Augustine, 145 Iowa, 246, 121 N. W. 373; Murray v. Davies, 77 Kan. 767, 94 Pac. 283; Exchange Bank of Kentucky v. Gaitskill, 18 Ky. Law Rep. 532, 37 S. W. 160; Rahm v. Bunger, 28 Ky. Law Rep. 806, 90 S. W. 257; Smith v. Commonwealth, 153 Ky. 385, 155 S. W. 1125; Eastern Trust & Banking Co. v. Cunningham, 103 Me. 455, 70 Atl. 17; Whiting v. Price, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262; Smith v. Werkheiser, 152 Mich. 177, 115 N. W. 964, 15 L. R. A. (N. S.) 1092, 125 Am. St. Rep. 406; Yanelli v. Littlejohn, 172 Mich. 91, 137 N. W. 723; Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; McCarty v. New York Life Ins. Co., 74 Minn. 530, 77 N. W. 426; Van Metre v. Nunn, 116 Minn. 444, 133 N. W. 1012; Thaler v. Niedermeyer, 185 Mo. App. 257, 170 S. W. 378; Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558; State v. Donaldson, 243 Mo. 460, 148 S. W. 79; Davis v. Forman, 229 Mo. 27, 129 S. W. 213; Brown v. Kansas City South. Ry. Co., 187 Mo. App. 104, 173 S. W. 73; Turner v. Kuehnle, 70 N. J. Eq. 61, 62 Atl. 327; Mead v. Bunn, 32 N. Y. 275; Fox v. Duffy, 95 App. Div. 202, 88 N. Y. Supp. 401; Delano v. Rice, 21 Misc. Rep. 714, 48 N. Y. Supp. 130; White Sewing Mach. Co. v. Bullock, 161 N. C. 1, 76 S. E. 634; Halsell v. First Nat. Bank (Okl.) 150 Pac. 489; Lake v. Weber, 6 Pa. Super. Ct. 42; United States Gypsum Co. v. Shields (Tex. Civ. App.) 106 S. W. 724; Western Cottage Piano & Organ Co. v. Anderson, 45 Tex. Civ. App. 513, 101 S. W. 1061; Foix v. Moeller (Tex. Civ. App.) 159 S. W. 1048; Benton v. Kuykendall (Tex. Civ. App.) 160 S. W. 438; Hammel v. Benton (Tex. Civ. App.) 162 S. W. 34; Underwood v. Jordan (Tex. Civ. App.) 166 S. W. 88; Crompton v. Beedle, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399; Lowe v. Trundle, 78 Va. 65; Jordan v. Walker, 115 Va. 109, 78 S. E. 643; Gilluly v. Hosford, 45 Wash. 594, 88 Pac. 1027; Fischer v. Hillman, 68 Wash. 222, 122 Pac. 1016, 39 L. R. A. (N. S.) 1140.

<sup>660</sup> Mead v. Bunn, 32 N. Y. 275. And see Farley v. Wiess, 76 Neb. 402, 107 N. W. 561.

men are knaves and liars, and which declares them guilty of negligence, and refuses them redress, whenever they fail to act on that presumption. The fraudulent vendor cannot escape from liability by asking the law to applaud his fraud and condemn his victim for his credulity."<sup>661</sup> So the court in California explains that the rule that means of knowledge is equivalent to knowledge, and that one having the opportunity, and knowing the facts constituting the fraud of which he complains, cannot be inactive and afterwards allege a want of knowledge arising by reason of his own laches, applies to a determination of whether or not an action has been brought within the time limited after the discovery of the fraud, but has no application to the right of a party to a cancellation of his contract on the ground of fraud; and equity will not withhold relief from parties ignorant of the true condition who, relying on false representations as to material facts, made for the purpose of inducing assent, are thereby inveigled into contracts, on the ground that there were circumstances calculated to arouse suspicion and cause an investigation whereby they might have discovered the fraud, for the liability of the adverse party arises from his own fraud, unaffected by the question of diligence on the part of the one seeking relief.<sup>662</sup> Along the same line of thought, the court in Missouri points out that fraud is a willful and malevolent act, directed to perpetrating a wrong to the rights of another, and such an act in a vendor is actionable as against the mere negligence or inadvertence of the purchaser in failing to prevent fraud.<sup>663</sup> And in Massachusetts it is said that the old rule that fraudulent representations may be such that one is not justified in acting upon them is now somewhat relaxed, in order that persons guilty of actual fraud may not too easily escape liability by setting up the victim's undue guilelessness;<sup>664</sup> for while the law will not

<sup>661</sup> *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

<sup>662</sup> *Eichelberger v. Mills Land & Water Co.*, 9 Cal. App. 628, 100 Pac. 117.

<sup>663</sup> *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979.

<sup>664</sup> *Reggio v. Warren*, 207 Mass. 525, 93 N. E. 805, 32 L. R. A. (N. S.) 340, 20 Ann. Cas. 1244.

save persons from the consequences of their own improvidence and negligence, yet it looks with even less favor upon misrepresentation and fraud.<sup>665</sup> In New York, the rule is stated to be that one who perpetrates a fraud is estopped to claim that the party defrauded ought not to have believed or trusted him.<sup>666</sup> And in Oregon, it is held that, where one assumes to have knowledge of a subject of which another may be ignorant, and knowingly makes false representations regarding it, upon which the other relies to his injury, the party who makes such statements will not be heard to say that the person who took his word and relied upon it was guilty of such negligence as to be precluded from receiving compensation for injuries which were inflicted on him under cover of the falsehood.<sup>667</sup>

To illustrate this rule by some pertinent examples, we may cite first certain cases holding that, where a party was guilty of a positive and willful fraud inducing the adverse party to act thereon and to execute an instrument, the fact that the adverse party was guilty of negligence in executing the paper without further inquiry as to its contents will not deprive him of the right to sue for fraud.<sup>668</sup> So the fact that a grantee might have ascertained the exact amount of a debt secured by a mortgage on the property, by communicating with the mortgagee, is no defense to an action by him for deceit against his grantor for a willfully false representation as to the amount of such debt.<sup>669</sup> And where a vendor makes a false representation as to the amount of taxes due on the premises, he is liable, although the vendee could have ascertained its falsity by inquiry.<sup>670</sup> So again, a person taking the note of a third person in payment for property, on the false representation that the

<sup>665</sup> *Rollins v. Quimby*, 200 Mass. 162, 86 N. E. 350.

<sup>666</sup> *Electrical Audit & Rebate Co v. Greenberg*, 56 Misc. Rep. 514, 107 N. Y. Supp. 110. And see *Wells v. Adams*, 88 Mo. App. 215.

<sup>667</sup> *Steen v. Weisten*, 51 Or. 473, 94 Pac. 834. And see *Buckley v. Acme Co.*, 113 Ill. App. 210.

<sup>668</sup> *Muller v. Rosenblath*, 157 App. Div. 513, 142 N. Y. Supp. 602; *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Walker v. Freedman* (Sup.) 114 N. Y. Supp. 51.

<sup>669</sup> *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793.

<sup>670</sup> *Wright v. United States Mortgage Co.* (Tex. Civ. App.) 42 S. W. 789.



maker is responsible, is entitled to recover damages, though he might have ascertained the falsity of the statement.<sup>671</sup> And a purchaser of real estate is entitled to rely upon the representations of an agent for the sale thereof, as to its location, and is not bound by the doctrine of caveat emptor to make further inquiries as to its boundaries.<sup>672</sup> Again, where plaintiff employed defendant as an architect and supervisor of construction of a building, on his fraudulent representations that he had great knowledge and skill in such matters, and that the maximum cost of the building such as plaintiff desired would not exceed a certain sum, it was held that he had thereafter a right to rely on such representations, and so was not guilty of such carelessness as to bar his right to recover because not exercising means to ascertain that the representations were not true.<sup>673</sup> On the same principle, one who was a director and vice president of a bank, and who bought stock from the cashier in reliance on the latter's representations as to the condition of the bank, was held not estopped by negligence in not knowing its condition from recovering for the false representations.<sup>674</sup> And a brewery which fraudulently sells intoxicating liquor as a non-intoxicating brew cannot defeat a recovery by a retail purchaser on the ground that it was his duty to inspect the liquor and ascertain its character.<sup>675</sup>

**§ 115. Same; Extent of Investigation Necessary.—** While a person negotiating for a contract is not justified in relying blindly on representations made to him by the other party, where the facts are open to his view, yet he should not be required to enter into any detailed study of the subject-matter in order to verify the statements made, nor should he be charged with negligence precluding any relief against fraud, if he omits to make such a study. As stated in some of the decisions, one is justified in relying

<sup>671</sup> *Pallister v. Camenisch*, 21 Colo. App. 79, 121 Pac. 958.

<sup>672</sup> *Roberts v. Holliday*, 10 S. D. 576, 74 N. W. 1034.

<sup>673</sup> *Edward Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 126 Pac. 351, 42 L. R. A. (N. S.) 125.

<sup>674</sup> *Snider v. McAtee*, 165 Mo. App. 260, 147 S. W. 136.

<sup>675</sup> *Anderson v. Evansville Brewing Ass'n*, 49 Ind. App. 403, 97 N. E. 445.

on a representation made to him in all cases where the representation is a positive statement of fact, and where an "investigation" would be required to discover the truth.<sup>676</sup> We understand the term "investigation," as here used, to denote a search, a test, or an inquiry—something more, in fact, than a mere inspection of visible characteristics, or an examination more detailed or exhaustive than is implied in merely superficial observation. Thus, in Wisconsin, it is said that a person cannot complain of false representations when he might have discovered the truth of the matter by the exercise of ordinary observation, not necessarily by search;<sup>677</sup> and in Washington, that the rule of non-liability for false representations as to the condition of an article is applicable only in those cases where the defect is patent, and can be ascertained by the use of ordinary care and prudence.<sup>678</sup> Thus, for example, where the vendor of land states positively that the tract contains a certain number of acres, the vendee may rely on this statement, and is not bound, as a measure of precaution, to have it surveyed and measured, and he may rescind the sale, or obtain a reduction of the purchase price, if there is less land than the vendor represents.<sup>679</sup> So, where land sold is situated in a state other than that in which the parties live and contract, the purchaser is not obliged to go or send into that state and examine the property in order to ascertain whether the vendor's representations in regard to it are true or false.<sup>680</sup> So, prospective purchasers of mining property have a right to rely on statements made to them

<sup>676</sup> *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Brucker v. Kalrn*, 89 Neb. 274, 131 N. W. 382; *Martin v. Hutton*, 90 Neb. 34, 132 N. W. 727, 36 L. R. A. (N. S.) 602; *Latta v. Button Land Co.*, 91 Neb. 689, 136 N. W. 1013; *H. W. Abts Co. v. Cunningham*, 95 Neb. 836, 146 N. W. 1036.

<sup>677</sup> *Jacobsen v. Whitely*, 138 Wis. 434, 120 N. W. 285.

<sup>678</sup> *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032. But see *Hafer v. Cole*, 176 Ala. 242, 57 South. 757, holding that, where a buyer has a right to rely on the seller's representations, it is immaterial that the defects are patent.

<sup>679</sup> *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96; *Lovejoy v. Isbell*, 73 Conn. 368, 47 Atl. 682; *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558; *Farris v. Gilder* (Tex. Civ. App.) 115 S. W. 645.

<sup>680</sup> *Scott v. Burnight*, 131 Iowa, 507, 107 N. W. 422; *Hansen v. Kline*, 136 Iowa, 101, 113 N. W. 504. And see, *infra*, § 118.

by the owners as to the presence of extensive beds of ore at the bottom of certain pits and trenches, and are not called upon to go into them and determine the truth by dipping out the water or digging out the earth with which they are filled.<sup>681</sup> So, where the property bought is a mill with its machinery, including a boiler, the purchaser is justified in relying on representations made to him concerning the capacity and condition of the boiler, as it is not an article the condition of which can be ascertained by ordinary inspection, but only by tests involving time and labor.<sup>682</sup>

On the same principle, a person is not to be charged with negligence precluding relief, although the falsity of the representations made to him could have been discovered by inquiries addressed to third persons, even where such inquiries are suggested, and the third persons named, by the other party to the contract.<sup>683</sup> For instance, where one buys property incumbered by a mortgage, he can ascertain the exact amount due on the mortgage by inquiring of the mortgagee; but if the grantor makes a positive false representation as to such amount, the grantee's omission to prosecute such an inquiry will not prevent him from obtaining relief.<sup>684</sup> The rule is the same in regard to the amount of taxes due on a property sold. This amount could be ascertained by inquiries in the proper quarter or by a search of the records; but the omission to inquire is not negligence, in the face of a willful misrepresentation by the grantor.<sup>685</sup> So again, where a subscriber for stock in a corporation relies on the statements of fact set forth in the prospectus, which are misleading and false, he may rescind, notwithstanding the fact that he might have discovered their falsity by an examination of documents which are referred to in the prospectus, for he is not bound to pursue his inquiries to that extent.<sup>686</sup> And while the pur-

<sup>681</sup> *Green v. Turner*, 86 Fed. 837, 30 O. O. A. 427.

<sup>682</sup> *Beecher v. Wilson*, 63 Wash. 149, 114 Pac. 899.

<sup>683</sup> *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884.

<sup>684</sup> *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793.

<sup>685</sup> *Wright v. United States Mortgage Co.* (Tex. Civ. App.) 42 S. W. 789; *Woteshek v. Neumann*, 151 Wis. 365, 138 N. W. 1000; *Clark v. Thorpe Bros.*, 117 Minn. 202, 135 N. W. 387.

<sup>686</sup> *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. App. 99, affirming *Kisch v. Venezuela Cent. Ry. Co.*, 34 Law J. Ch. 545.

chaser of land, knowing the facts and acting upon his own judgment, cannot avoid performance of the contract, because of false representations of the vendor as to the value of the land and the annual rentals therefrom, such purchaser is not deprived of his remedy because he might, by a more thorough inspection, have learned of the falsity of the representations.<sup>687</sup> And so, a purchaser of territorial rights under a patent may rely on the representations of his vendor as to their value, and is not obliged to prosecute an inquiry, demanding peculiar skill and knowledge, into their character.<sup>688</sup>

§ 116. **Same; Examination of Public Records.**—Where representations rendering a transaction rescindable for fraud relate to matters of record, or which are spread upon the public records, the injured party is not chargeable with notice of the facts, nor is he required, as a precautionary measure, to examine the records in order to test the accuracy of the representations, but he may rely on such representations, in the absence of any actual knowledge on his part.<sup>689</sup> Thus, for example, a vendor of land, making false representations with respect to the nature or validity of his title, with intent that the same shall be relied and acted on, is liable therefor, if the purchaser does actually rely on them to his injury, although the falsity of the representations could have been discovered by a search of the public records.<sup>690</sup> The same rule applies also where the representations relate to incumbrances on the property, the truth of the matter being discoverable from the records, as, where the incumbrances are falsely represented or it is stated that the property is unincumbered,<sup>691</sup> or where the

<sup>687</sup> *Circle v. Potter*, 83 Kan. 363, 111 Pac. 479.

<sup>688</sup> *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739.

<sup>689</sup> *Hall v. Bank of Baldwin*, 143 Wis. 303, 127 N. W. 909; *Severson v. Kock*, 159 Iowa, 343, 140 N. W. 220. And see other cases cited *infra*, this section.

<sup>690</sup> *Morris v. Brown*, 38 Tex. Civ. App. 266, 85 S. W. 1015; *Hunt v. Barker*, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812; *Curtley v. Security Sav. Soc.*, 46 Wash. 50, 89 Pac. 180; *Manley v. Johnson*, 85 Vt. 262, 81 Atl. 919; *Morton v. Clack* (Ky.) 10 S. W. 796.

<sup>691</sup> *Blumenfeld v. Stine*, 42 Misc. Rep. 411, 87 N. Y. Supp. 81; *Gannon, Goulding & Thies v. Hausaman*, 42 Okl. 41, 140 Pac. 407, 52 L. R. A. (N. S.) 519; *Oben v. Adams* (Vt.) 94 Atl. 506.

vendor states that he has paid off the mortgage debt,<sup>692</sup> or where the seller of a mortgage or a note secured by mortgage falsely states that the mortgage is a first or only lien.<sup>693</sup> So, where defendant exchanges property with plaintiff, and represents that he paid a stated amount for the property, he cannot urge as a defense in an action for damages for misrepresenting the amount paid that the plaintiff did not resort to the means available for the detection of the falsity of the representations, or was negligent in failing to examine the public records for that purpose.<sup>694</sup> And it is no defense to an action for false representations on a sale of letters patent, the representations being that it was the only patent for the article covered by the letters, that the plaintiff might, by examining the records of the patent office have discovered the fraud.<sup>695</sup> So, in an action by a purchaser of city lots to rescind the sale on the ground that the lots conveyed were not those pointed out to him by his agent employed to negotiate the purchase, where it appears that the supposed agent was the real party in interest, he cannot object that the purchaser could have discovered the fraud by an inspection of the public records, as the latter had a right to rely on the agent's statements.<sup>696</sup> And in an action against a vendor for falsely representing the quantity of the land, it is no defense that the purchaser might have ascertained the falsity of the representations by a survey or by reference to the official plats and records.<sup>697</sup> So again, the vendor of land cannot avoid the consequences of his fraudulent representations as to the amount of taxes unpaid, merely because the purchaser might have consulted the official tax records.<sup>698</sup>

<sup>692</sup> *Scott v. Moore*, 89 Ark. 321, 116 S. W. 660.

<sup>693</sup> *Rollins v. Quimby*, 200 Mass. 162, 86 N. E. 350; *Kehl v. Abram*, 210 Ill. 218, 71 N. E. 347, 102 Am. St. Rep. 158.

<sup>694</sup> *Holmes v. Rivers*, 145 Iowa, 702, 124 N. W. 801.

<sup>695</sup> *McKee v. Eaton*, 26 Kan. 226.

<sup>696</sup> *Rohrof v. Schulte*, 154 Ind. 183, 55 N. E. 427.

<sup>697</sup> *Miller v. Wissert*, 38 Okl. 808, 134 Pac. 62.

<sup>698</sup> *Clark v. Thorpe Bros.*, 117 Minn. 202, 135 N. W. 387; *Woteshek v. Neumann*, 151 Wis. 365, 138 N. W. 1000; *Wright v. United States Mortgage Co.* (Tex. Civ. App.) 42 S. W. 789.

§ 117. **Same; Constructive Notice and Facts Suggesting Inquiry.**—We have shown in the preceding sections that, where false and fraudulent representations are made, inducing a party to enter into a contract, he is not chargeable with negligence precluding relief merely because the falsity of the representations could have been discovered by him if he had prosecuted an independent investigation into the subject-matter, which he failed to do. But it must now be added that this rule does not apply where there are facts within the knowledge of the defrauded party of such a nature as to cast grave suspicion on the veracity of the representations made to him, or such that a person of ordinary care and prudence would not be satisfied to rely supinely upon them, without making some effort to probe and test their truthfulness.<sup>699</sup> Thus, for example, if one negotiating for the purchase of property is told that a third person claims to be the owner of it and does not admit the validity of the title of the proposed vendor, it would be gross negligence for him to rely upon such vendor's assurance that his title is good, without further inquiry, and he cannot obtain relief if defrauded thereby.<sup>700</sup> A similar rule applies where the purchaser of property at auction is told by the auctioneer, in answer to his own question, that the sale is made without any guaranty except of title,<sup>701</sup> where the vendor of property makes no representation as to the quality of the goods, but tells the purchaser to look for himself, which the latter omits to do,<sup>702</sup> and where a party to the contract, having made a certain material representation, refuses to sign a written statement to the same effect, while reiterating the assurance verbally given.<sup>703</sup> So also,

<sup>699</sup> *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732; *Gerner v. Mosher*, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244; *Sloan v. Holcomb*, 29 Mich. 153; *Kaiser v. Nummerdor*, 120 Wis. 234, 97 N. W. 932; *Shahan v. Brown*, 167 Ala. 534, 52 South. 737; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 157 S. W. 37; *Veney v. Furth*, 171 Mo. App. 678, 154 S. W. 793.

<sup>700</sup> *Grosjean v. Galloway*, 82 App. Div. 380, 81 N. Y. Supp. 871; *Moore v. Pooley*, 17 Idaho, 57, 104 Pac. 898.

<sup>701</sup> *Rochel v. Berwick*, 12 La. Ann. 847.

<sup>702</sup> *Badger v. Whitcomb*, 66 Vt. 125, 28 Atl. 877.

<sup>703</sup> *Ettlinger v. Well*, 184 N. Y. 179, 77 N. E. 81, reversing 94 App.

he ought not to have trusted, or, shutting his eyes where he ought to have kept them open, charge the defendant with the consequences of his folly. Every man is bound to exercise his judgment when he can do so, but when the means of forming a correct conclusion are peculiarly possessed by one, then, if that person misrepresents and deceives another to his damage, he is liable, otherwise not.”<sup>645</sup> “Fraud consists in a willful misrepresentation of facts, or in fraudulent concealment of them with a view to deceive. If a party honestly believes the representations which he makes to be true, he is guilty of no moral turpitude or legal responsibility for making them. To be guarded against injury, each of the contracting parties should inform himself of the true state of the facts, or exact a warranty from the other for his indemnity, knowing, as he should be taught by the law, that he has no redress over or discharge from his contract, unless he has been deceived into it by the willful misrepresentations or fraudulent concealment of material facts by the other contracting party.”<sup>646</sup>

This rule is not restricted to cases of sales, but applies equally to other classes of contracts. For instance, a subscriber for stock in a corporation must be deemed to know what he could have known by the exercise of reasonable diligence; and where he could have verified any of the statements inducing the subscription, and could have ascertained everything about the affairs of the corporation, he may not complain on the ground of fraud.<sup>647</sup> So, the misrepresentation to another of the contents of a writing, which both have the opportunity and ability to read, and which both sign, where the one does not fraudulently prevent the other from reading it, does not vitiate the writing.<sup>648</sup> And a representation as to the market value or current market price of a commodity which is the subject of

<sup>645</sup> 2 Add. Torts (Wood's edn.) § 1175, note.

<sup>646</sup> *Livermore v. Middlesborough Town-Lands Co.*, 106 Ky. 140, 50 S. W. 6.

<sup>647</sup> *In re American Nat. Beverage Co.* (D. C.) 193 Fed. 772.

<sup>648</sup> *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 South. 663; *United Breeders' Co. v. Wright*, 134 Mo. App. 717, 115 S. W. 470. And see, *supra*, § 52.



the bargain may not be relied on where the true figure can easily be ascertained.<sup>649</sup>

The rule applies with special force where the matter about which the person claims to have been deceived is a matter within his own personal knowledge. Thus, where an insurance company induced the insured person to settle his claim by representing that, in the application for the policy, then in the insurer's possession, the insured made false statements vitiating the policy, he has no cause of action for deceit, for he must be presumed to know whether or not he signed such a statement, and should have demanded an inspection of the application.<sup>650</sup> So the rule is closely applied in cases where the representations relate to matters which can easily be verified by mere inspection, as, where they concern the physical condition of property, its appearance, dimensions, weight, or the like,<sup>651</sup> or where an instrument or document shows on its face that it is not what it is represented to be.<sup>652</sup> So, where one about to sell a stock of goods represented to the prospective buyer that the stock was worth the invoice price, was practically new, and first-class in every respect and readily salable, and the stock was at hand and the buyer competent to examine it, it was held that the representations related to matters of judgment, concerning which the buyer was required to judge for himself.<sup>653</sup> Also there seems to be special ground for the application of this rule in cases where the party is bound, for other reasons, to be cognizant of the facts. Thus, a misrepresentation made to a board of public officers, concerning a fact which they can ascertain for themselves and which they are bound to know as pertaining to their own duties, but as to which they neglect to inform themselves, does not furnish ground for the interference of a court of equity.<sup>654</sup> And where a party places the conduct

<sup>649</sup> *Kincaid v. Price*, 82 Ark. 20, 100 S. W. 76; *Graffenstein v. Epstein*, 23 Kan. 443, 33 Am. Rep. 171.

<sup>650</sup> *Davis v. Phoenix Ins. Co.*, 81 Mo. App. 264.

<sup>651</sup> *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593.

<sup>652</sup> *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1091.

<sup>653</sup> *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613.

<sup>654</sup> *Churchill Tp. v. Cummings Tp.*, 51 Mich. 446, 16 N. W. 805.

plies to one who lends money to a corporation on the strength of false representations concerning its solvency made by the president and secretary of the company.<sup>713</sup> So, inquiring of the sheriff, and relying on the information he gives, as to the nature of the liens and levies of executions in his hands on property offered for sale in his presence, is exercising reasonable caution and diligence, as this is a matter peculiarly within his knowledge.<sup>714</sup> And a party making a contract has a right to rely on a statement made by the other party, as to a matter within the latter's knowledge, when the only other information obtainable would be a statement of a third person.<sup>715</sup>

In the next place, one may rely implicitly on representations made to him where it is impossible to make an independent investigation, or where they relate to matters which are not open to inspection or examination,<sup>716</sup> or where the defrauded party would not have been able to discover the falsity of the representations by any investigation which it was in his power to make,<sup>717</sup> or where the truth of the matter could not be ascertained without an unreasonable amount of trouble and expense.<sup>718</sup> Thus, for example, false representations as to mining property will give a right of rescission where it was physically impossible to make any examination of the property because the mine was filled with water.<sup>719</sup> And the same principle applies where real property, the subject of a sale, is overgrown with brush and the survey stakes destroyed,<sup>720</sup> or is covered with snow, so that the purchaser cannot examine the land to determine its character and quality.<sup>721</sup> Again, where

<sup>713</sup> *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811.

<sup>714</sup> *Wicker v. Worthy*, 51 N. C. 500.

<sup>715</sup> *Old Colony Trust Co. v. Dubuque Light & Traction Co. (C. C.)* 89 Fed. 794.

<sup>716</sup> *Kathan v. Comstock*, 140 Wis. 427, 122 N. W. 1044, 28 L. R. A. (N. S.) 201; *Graybill v. Drennen*, 150 Ala. 227, 43 South. 568.

<sup>717</sup> *Dow v. Swain*, 125 Cal. 674, 58 Pac. 271.

<sup>718</sup> *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172. And see *Becker v. Clark*, 83 Wash. 37, 145 Pac. 65.

<sup>719</sup> *Arbuckle v. Blederman*, 94 Ind. 168.

<sup>720</sup> *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880.

<sup>721</sup> *Knapp v. Schemmel (Iowa)* 124 N. W. 309.

one of the parties to a written contract is blind, he may rescind if its contents were misrepresented to him by the other party.<sup>722</sup> So, a buyer of corporate stock may rely on the seller's statement as to the amount of the indebtedness of the corporation where, at the same time, he is told that there are no books of account which would show such indebtedness.<sup>723</sup> Again, the failure to test the accuracy of representations inducing a contract may be excused, and relief may be given on account of their falsity, where the defrauded party had not the ability to investigate their truth, because such investigation would require special knowledge, skill, or experience, which he did not possess.<sup>724</sup> Thus, where one purchasing an interest in a business was a stranger in the locality and had no adequate means of ascertaining the truth or falsity of statements made by the seller as to the character, volume, and value of the business, he cannot be charged with negligence precluding relief because he failed to investigate their accuracy.<sup>725</sup> So, where the buyer of a stock of jewelry was a grocer and unfamiliar with the jewelry business or the quality or value of the jewelry purchased, and relied expressly on the seller's knowledge and the representations which he made, it was held that the rule of caveat emptor would not apply.<sup>726</sup> And a similar decision was made in the case of a purchaser of desert land who, having no knowledge on the subject of irrigation, relied on the seller's representations as to the amount of water that would be necessary for the irrigation of the land.<sup>727</sup>

In the next place, a purchaser is excused from the necessity of making an investigation, and may rely on representations made to him, where the property which is the sub-

<sup>722</sup> *Muller v. Rosenblath*, 157 App. Div. 513, 142 N. Y. Supp. 602. And see, *supra*, § 57.

<sup>723</sup> *Davis v. Butler*, 154 Cal. 623, 98 Pac. 1047.

<sup>724</sup> *Sanford & Brooks Co. v. Columbia Dredging Co.*, 177 Fed. 878, 101 C. C. A. 92; *Howell v. Wyatt*, 168 Ill. App. 651; *Hines v. Royce*, 127 Mo. App. 718, 106 S. W. 1001; *Becker v. Sunnyside Land & Inv. Co.*, 76 Wash. 685, 136 Pac. 1147.

<sup>725</sup> *Mayberry v. Rogers*, 81 Ill. App. 581.

<sup>726</sup> *Lyon v. Lindblad*, 145 Mich. 588, 108 N. W. 969.

<sup>727</sup> *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503.

ject of the bargain is at a distant place, so that it cannot readily be examined, and to visit the scene and inspect it would involve unreasonable expense and trouble.<sup>728</sup> Thus, where defendants, in order to induce plaintiff to purchase an interest in a salmon packing outfit, represented that the property consisted of a store building and site located in a place remote from that where the bargain was made, and practically inaccessible to the plaintiff at the time, and defendants knew that plaintiff had no knowledge concerning such store building and site, except from their own representations, it was held that plaintiff was not bound to exercise diligence to ascertain whether the representations were true or false, but was entitled to rely on their being true, and to recover damages for their falsity.<sup>729</sup> And again, a party making a contract to dredge a harbor, and being at some distance from the harbor at the time, is entitled to rely on the representations of the other party, who has done a portion of the work and had access to the chart showing soundings, as to the thickness of the rock to be removed, and is not required to investigate the facts himself.<sup>730</sup> On the same principle, where the subject of sale is land which lies in a foreign country or in a state other than that in which the purchaser resides, he is under no obligation to visit the premises (or send an agent) in order to examine into its character, quality, situation, etc., but may rely on what the vendor tells him as to these matters, and if the vendor's representations were false and fraudulent, the purchaser may have appropriate relief, notwithstanding his failure to investigate.<sup>731</sup> And this rule

<sup>728</sup> *Wakefield v. Coleman*, 159 Iowa, 241, 140 N. W. 386; *Bishop v. Seal*, 87 Mo. App. 256; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Robertson v. Frey*, 72 Or. 599, 144 Pac. 128; *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585; *Rogers v. Rosenfeld*, 158 Wis. 285, 149 N. W. 33.

<sup>729</sup> *Martin v. Burford*, 181 Fed. 922, 104 C. C. A. 360.

<sup>730</sup> *Hingston v. L. P. & J. A. Smith Co.*, 114 Fed. 294, 52 C. C. A. 206.

<sup>731</sup> *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530; *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018; *Sherwood v. Salmon*, 5 Day (Conn.) 439, 5 Am. Dec. 167; *Byers v. McNeill* (Iowa) 76 N. W. 685;

applies even though the vendor tells the purchaser that he himself has never seen the property, if he still makes positive representations concerning its condition and character.<sup>732</sup> So, in an action for damages for failure to deliver a mortgage as agreed, which mortgage was stated by the defendant to cover certain described land in another state, which representations were false, the plaintiff is entitled to rely wholly on such representations, without consulting the public records of such other state.<sup>733</sup> And a purchaser of stock of a corporation, whose principal office is in a distant state, and whose property is at a distance, may rely on the representations of the seller as to the business and assets of the corporation, and, in case of misrepresentations, may rescind the purchase and recover the price paid.<sup>734</sup>

It is also considered that a person relying on representations made to him, and failing to take steps to ascertain their truth or falsity, is not chargeable with such negligence as should preclude relief where the truth of the matter could only be discovered by a test or trial of the subject-matter. For instance, where the vendor of a tannery falsely represented that the water power connected therewith was sufficient to work it continuously throughout the year, and thereupon the purchaser made extensive repairs, and, on the water failing, abandoned the property and notified the vendor, who took possession and had the benefit of the repairs made, it was held that the purchaser could recover for the cost of the repairs.<sup>735</sup> So a buyer of letters patent for the manufacture of harness buckles may rely on the seller's statement as to the cost of manufacturing the

*Scott v. Burnight*, 131 Iowa, 507, 107 N. W. 422; *Hansen v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883; *Clinkenbeard v. Weatherman*, 157 Mo. 105, 57 S. W. 757; *Adams v. Barber*, 157 Mo. App. 370, 139 S. W. 489; *Ross v. Sumner*, 57 Neb. 588, 78 N. W. 264; *Fishback v. Miller*, 15 Nev. 428; *Heyrock v. Surerus*, 9 N. D. 28, 81 N. W. 36; *Linhart v. Foreman's Adm'rs*, 77 Va. 540; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753.

<sup>732</sup> *Savage v. Stevens*, 126 Mass. 207.

<sup>733</sup> *Wilson v. Clark*, 63 Wash. 136, 114 Pac. 916.

<sup>734</sup> *McFeron v. Shoemaker*, 73 Wash. 450, 131 Pac. 1126.

<sup>735</sup> *Farris v. Ware*, 60 Me. 482; *H. W. Abts Co. v. Cunningham*, 95 Neb. 836, 146 N. W. 1036. And see *Harlow v. Perry*, 113 Me. 239, 93 Atl. 544.

buckle, where it is a novel mechanical device and has no established market price.<sup>736</sup> And the same rule was applied in the case of a sale of a type-setting machine, the defects in which would not have become obvious to the purchaser by the reasonable use of his opportunity to examine the machine.<sup>737</sup>

Again, a contract procured by means of false representations may be avoided, though the means of obtaining information were fully open to the party deceived, where, from the circumstances, he was induced to rely upon the information and representations of the other party.<sup>738</sup> This rule applies, for instance, where a purchaser makes inquiries as to the reputation and standing of the vendor, and, finding it to be good, relies on the representations made to him by the vendor,<sup>739</sup> or where one party exhibits to the other letters or testimonials tending to create a favorable impression or to confirm his statements,<sup>740</sup> or refers him to third parties, from whom, on their being questioned, encouraging or confirmatory statements are obtained.<sup>741</sup> And for even stronger reasons, if one of the parties to a contract expressly tells the other that he is unacquainted with the subject-matter and intends to rely entirely on what such other tells him in regard to it, he may have relief on discovering that the representations made to him were false and fraudulent, even though he could have discovered their falsity by having recourse to means of information which were fully open to him.<sup>742</sup>

<sup>736</sup> *Braley v. Powers*, 92 Me. 203, 42 Atl. 362.

<sup>737</sup> *Walker, Evans & Cogswell Co. v. Ayer*, 80 S. O. 292, 61 S. E. 557.

<sup>738</sup> *Cross v. Herr*, 96 Ind. 96; *Matlock v. Todd*, 19 Ind. 130.

<sup>739</sup> *Stony Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722.

<sup>740</sup> *Stoll v. Wellborn* (N. J. Ch.) 56 Atl. 894.

<sup>741</sup> *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447; *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090.

<sup>742</sup> *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891; *Ross v. Bolte*, 165 Iowa, 499, 146 N. W. 31; *Ohlwine v. Pfaffman*, 52 Ind. App. 357, 100 N. E. 777; *Greene v. Curtis Automobile Co.*, 144 Wis. 493, 129 N. W. 410; *Watson v. Molden*, 10 Idaho, 570, 79 Pac. 503; *Grant v. Ledwidge*, 109 Ark. 297, 160 S. W. 200.

§ 119. **Effect of Fiduciary Relations Between the Parties.**—When one of the parties to a contract occupies a relation of trust and confidence towards the other, such as that of a trustee, guardian, agent, attorney, partner, etc., he is charged with the duty of exact truthfulness and of making full disclosure of all pertinent facts within his knowledge, in order that the contract may be a valid one, and any concealment or misrepresentation of a material matter on his part amounts to a fraud sufficient to entitle the injured party to relief; and the latter is entitled to rely implicitly on representations made to him, and is not chargeable with negligence because he fails to investigate or inquire into the matter for himself.<sup>743</sup> The relation of attorney and client, for instance, is a trust relation within the meaning of this rule; and where an attorney leased premises to his client, representing to him that the premises could be used as a meat market, whereas such use was prohibited by a city ordinance, it was held ground for rescinding the lease.<sup>744</sup> So, where a decree of partition was obtained in violation of the rights of one of the heirs, an infant, and the person benefiting thereby induced such heir, on reaching her majority, to execute a deed in conformity with the partition, representing to her that the execution of the deed was necessary and had been ordered by the court, the grantor being in ignorance of her legal rights, and it further appeared in the case that the relation of brother and sister existed between the parties, and that the grantor (the sister) was much under the influence of the grantee and reposed great confidence in him, it was held that the deed should be set aside as fraudulent.<sup>745</sup> The rule also extends to cases where the contracting parties are joint owners, joint purchasers, tenants in common, or members of a syndicate.<sup>746</sup> And it

<sup>743</sup> *Robinson v. Sharp*, 201 Ill. 86, 66 N. E. 299; *Stafford v. Maus*, 38 Iowa, 133; *Vance v. Supreme Lodge of Fraternal Brotherhood*, 15 Cal. App. 178, 114 Pac. 83. And see, *supra*, §§ 40 et seq.

<sup>744</sup> *Altgelt v. Gerbic* (Tex. Civ. App.) 149 S. W. 233.

<sup>745</sup> *Long v. Mulford*, 17 Ohio St. 485, 93 Am. Dec. 638.

<sup>746</sup> *Fisher v. Radford*, 153 Mich. 385, 117 N. W. 66; *McMullen v. Harris*, 165 Iowa, 703, 147 N. W. 164; *Kroll v. Coach*, 45 Or. 459, 78 Pac. 397, 80 Pac. 900; *Spence v. Denton*, 74 Ga. 395. And see, *supra*, § 44.



has also been held that where men deal as friends, and one accepts as true false representations made by the other, which, but for the relation of friendship, would have put him on inquiry, the law will protect him in his trust.<sup>747</sup> Generally, however, the law requires some relation of technical trust in order to apply this rule. Certainly it cannot be invoked where the parties deal on equal terms and at arms' length. Thus where, on an exchange of lands, one party told the other all he knew of certain lands to which he held a deed and which were included in the trade, and told him that he had never seen the lands and had no better means of knowledge as to their condition and situation than he gave to the plaintiff, it was held that there was no such basis of trust and confidence created as would authorize the setting aside of the agreement for fraud, there being in fact no such lands in existence.<sup>748</sup> And it has been remarked that a party negotiating for a compromise or settlement has no right to overlook the hostile position of the attorney for the other party or to expect advice from him.<sup>749</sup>

**§ 120. One Party Possessing Special, Expert, or Technical Knowledge.**—The rule imposing on one to whom representations are made the duty of ascertaining their truth by reasonable inquiry has no application to cases where the party making the representations is, or may be assumed to be, familiar with the subject-matter through the possession of that technical training or skill, experience, or expert knowledge which the subject demands and which the other party does not possess; because in this case they do not deal on equal terms, but the fact lies peculiarly within the knowledge of the one party, and the other is unable to verify the statements made to him.<sup>750</sup> Or conversely, the party

<sup>747</sup> *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162. And see *Hall v. Thompson*, 1 Smedes & M. (Miss.) 443.

<sup>748</sup> *Carwell v. Dennis*, 101 Ark. 603, 143 S. W. 135. And see *Bosley v. Monahan*, 137 Iowa, 650, 112 N. W. 1102.

<sup>749</sup> *Lewless v. Detroit, G. H. & M. Ry. Co.*, 65 Mich. 292, 32 N. W. 790.

<sup>750</sup> *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Kost v. Bender*, 25 Mich. 515; *Board of Water Com'rs of New London v. Robbins & Potter*, 82 Conn. 623, 74 Atl. 938; *Stewart v.*

defrauded may show that he was ignorant, by reason of his calling, character, and associations, of the matter to which the contract related.<sup>751</sup> In an instructive case of this character, it appeared that a person claiming to be a physician told a rustic, who was entirely inexperienced in the symptoms and effects of diseases, that her nephew was suffering from a valvular disease of the heart which was liable to terminate his life at any time, and that he could cure it, and demanded a sum of money for effecting such cure. All this being false, it was held that the pretended physician was guilty of an attempt to obtain money by false pretenses.<sup>752</sup> Again, a complaint is good on demurrer which alleges that a banker, expert in making computations, in settling a complicated account with one who was incapable of making such computations for himself, falsely and fraudulently made out an indebtedness to himself of a much larger sum than was really due, and thereby obtained payment of the larger sum, knowing that the other relied upon his computation.<sup>753</sup> And the same rule was applied in a case where the seller was an oil land promoter, and had been engaged in the oil land business for a long time, while the purchaser was entirely without knowledge of the subject.<sup>754</sup> So again, "a jeweler or a diamond merchant, who deals in diamonds and precious stones, has better means of knowing the nature and quality of the stones he sells than an unskilled stranger who comes to his shop to buy them. If, therefore, he represents a glittering stone to be a diamond, he impliedly warrants his knowledge of the truth of his representation. His statement amounts to a warranty of the fact to a purchaser, and the jeweler is responsible if the stone turns out to be only a piece of crystal, whether he knew the representation to be true or false."<sup>755</sup> There is

*Salisbury Realty & Ins. Co.*, 159 N. C. 230, 74 S. E. 736; *Lane v. Town of Harmony*, 112 Me. 25, 90 Atl. 546, Ann. Cas. 1915C, 874.

<sup>751</sup> *Albright v. Corley*, 40 Tex. 105; *Muck v. Hayden*, 173 Mo. App. 27, 155 S. W. 889; *Couch v. O'Brien*, 41 Okl. 76, 136 Pac. 1088.

<sup>752</sup> *People v. Arberry*, 13 Cal. App. 749, 114 Pac. 411.

<sup>753</sup> *Worley v. Moore*, 77 Ind. 567.

<sup>754</sup> *Brandt v. Krogh*, 14 Cal. App. 39, 111 Pac. 275.

<sup>755</sup> 2 Add. Torts (Wood's edn.) § 1184. And see *Picard v. McOormick*, 11 Mich. 68.

also a special rule where the vendor of an article is also the manufacturer of it. "The manufacturer of an article has superior means of information as to the nature and quality of the article he makes than a stranger not engaged in the manufacture. If, therefore, he represents the article he makes to be of some superior or peculiar quality, or to be fit for some particular purpose, in order to recommend it to a purchaser, his representation amounts to a warranty of the fact,"<sup>756</sup> and the purchaser, making his purchase on the strength of such representations, and finding himself deceived and misled, may repudiate the sale, although he made no special effort to determine the truth in advance.<sup>757</sup>

**§ 121. Party Relying on His Own Investigation.—**Where false and fraudulent representations are made concerning the subject-matter of a contract, but the person to whom they are made, before closing the contract (or before the time for payment arrives) inspects and examines the subject of the contract, or conducts an independent investigation into the matters covered by the representations, which is sufficient to inform him of the truth, and which is not interfered with or rendered nugatory by any act of the other party, it is presumed that he places his reliance on the information acquired by such investigation and on his own judgment based on such facts, and not on the representations made to him, and therefore he cannot have relief because his bargain proves unsatisfactory to him.<sup>758</sup> Thus,

<sup>756</sup> 2 Add. Torts (Wood's edn.) § 1191.

<sup>757</sup> *Jones v. Bright*, 3 Moore & P. 174; *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28.

<sup>758</sup> *Curran v. Smith*, 149 Fed. 945, 81 C. C. A. 537; *Mather v. Barnes* (C. C.) 146 Fed. 1000; *Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co.* (C. C.) 140 Fed. 888; *Smith & Benham v. Curran & Hussey* (C. C.) 138 Fed. 150; *Brown v. Smith* (C. C.) 109 Fed. 26; *Graybill v. Drennen*, 150 Ala. 227, 43 South. 568; *Dooley v. Burlington Gold Min. Co.*, 12 Ariz. 332, 100 Pac. 797; *Delolme v. State Sav. Bank*, 113 Ark. 599, 169 S. W. 229; *Wright v. Boltz*, 87 Ark. 567, 113 S. W. 201; *Williams v. Mitchell*, 87 Cal. 532, 26 Pac. 632; *Gratz v. Schuler*, 25 Cal. App. 117, 142 Pac. 899; *Stephens v. Orman*, 10 Fla. 9; *Hirschman v. O'Hara & Russell Co.*, 59 Fla. 517, 51 South. 550; *Hess v. Young*, 59 Ind. 379; *Hayslip v. Fields*, 142 Ga. 49, 82 S. E. 441; *Kline v. Kennedy*, 150 Ky. 729, 150 S. W. 998;

false representations on the sale or lease of a mining property, with regard to its value, the amount of ore in sight, its richness, or similar matters, afford no ground for rescission where the purchaser or lessee, instead of relying on what was told him, visited the mine for the purpose of informing himself and exercising his own judgment, or took possession of the property and worked it for a sufficient time to form a correct opinion for himself.<sup>759</sup> So, where the purchaser of a brokerage business examined the vendor's books before closing the trade, to see what the business was worth, he cannot defend against his note for the purchase price on the ground that the plaintiff overstated the value of the business in conversation with him.<sup>760</sup> And for the same reason, "representations and assertions of title by a vendor of real property, where the title deeds are submitted to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title, amount only to expressions of opinion and belief, and cannot be treated as a warranty."<sup>761</sup> Again, mis-

*Sohan v. Gibson*, 118 Ky. 403, 80 S. W. 1173; *Frank v. Lacey*, 3 Ky. Law Rep. 335; *Ross v. Bolte*, 165 Iowa, 499, 146 N. W. 31; *Bowen v. Walton*, 142 Ky. 509, 134 S. W. 885; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Allison v. Ward*, 63 Mich. 128, 29 N. W. 528; *Redfield v. Engel*, 171 Mich. 207, 137 N. W. 60; *Meland v. Youngberg*, 124 Minn. 446, 145 N. W. 167, Ann. Cas. 1915B, 775; *Younger v. Hoge*, 211 Mo. 444, 111 S. W. 20, 18 L. R. A. (N. S.) 94; *Grinrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891; *T. C. Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Bliven v. Robinson*, 83 Hun, 208, 31 N. Y. Supp. 662; *Gisel v. City of Buffalo*, 15 N. Y. St. Rep. 561; *Gordon v. Manhattan Desk Co. (Sup.)* 123 N. Y. Supp. 57; *Scott v. Walton*, 32 Or. 460, 52 Pac. 180; *Kreamer v. Smith*, 187 Pa. 209, 41 Atl. 43; *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914; *Peck v. Morgan (Tex. Civ. App.)* 156 S. W. 917; *Luckenbach v. Thomas (Tex. Civ. App.)* 166 S. W. 99; *Zavala Land & Water Co. v. Tolbert (Tex. Civ. App.)* 165 S. W. 28; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Harris v. Stewart*, 72 Wash. 661, 131 Pac. 212; *Ludington v. Renick*, 7 W. Va. 273. Compare *Tooker v. Alston*, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 818; *Hennessey v. Damourette*, 15 Colo. App. 354, 62 Pac. 229.

<sup>759</sup> *Winter v. Bostwick (C. C.)* 172 Fed. 285; *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97; *Weist v. Grant*, 71 Pa. 95; *Pike v. Vigers*, 2 Dru. & Wal. 1; *Whiting v. Hill*, 23 Mich. 399. Compare *Perkins v. Rice*, Litt. Sel. Cas. (Ky.) 218, 12 Am. Dec. 298.

<sup>760</sup> *Stocks v. Scott*, 89 Ill. App. 615.

<sup>761</sup> 2 Add. Torts (Wood's edn.) § 1189. See *Lee v. Haile*, 51 Tex.

representations by a vendor of real estate with reference to its area are not actionable when a correct description of the property is given in the deed and in the recorded chain of title, which the purchaser's agent undertook to investigate and report upon, and the vendor made no effort to prevent a full investigation.<sup>762</sup> So, the purchaser cannot complain of a misrepresentation as to the quantity of cleared land on the premises, where he himself had opportunity to judge, and ample means within his reach to form a correct estimate, and appears to have relied on his own judgment.<sup>763</sup> The same rule applies where the purchaser of an implement or piece of machinery tested its capacity or utility before binding himself to its purchase.<sup>764</sup>

It is not necessary to the application of this rule that the party in question should have made the investigation in person. The same result follows if he employs a third person, in whom he has confidence, to make the test or examination, and receives his report and relies on it,<sup>765</sup> as where a person purchases a tax title to lands on the advice of his attorney, whom he employs to investigate the public records, and who makes an extended search,<sup>766</sup> or where, before concluding the bargain, he has an examination made by an expert skilled in the particular business or process to which the subject-matter relates.<sup>767</sup>

As to the nature and extent of the investigation necessary to charge a party with knowledge of the facts, and prevent him from claiming relief on the ground of false representations, it has been said that one who undertakes to discover the truth of representations made to him is chargeable with knowledge of everything which a proper investigation would

Civ. App. 632, 114 S. W. 403; *Fordtran v. Cunningham* (Tex. Civ. App.) 177 S. W. 212.

<sup>762</sup> *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419.

<sup>763</sup> *Port v. Williams*, 6 Ind. 219.

<sup>764</sup> *Arnold v. Norfolk & N. B. Hosiery Co.*, 148 N. Y. 392, 42 N. E. 980; *American Harrow Co. v. Martin* (Ky.) 36 S. W. 178.

<sup>765</sup> *Palmer v. Shields*, 71 Wash. 463, 128 Pac. 1051.

<sup>766</sup> *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931.

<sup>767</sup> *Smith v. Fowler*, 7 Ky. Law Rep. 230; *Mitchell Mining Co. v. Hammons*, 12 Ariz. 300, 100 Pac. 795.

disclose.<sup>768</sup> But the better opinion appears to be that a partial or limited examination of the subject-matter makes him responsible only for knowledge of what that examination actually discloses, and does not legally prevent him from relying on representations covering a wider range.<sup>769</sup> And one who concludes a contract on the basis of representations made to him, which are false in fact, is not barred of relief by the mere fact that he sought and obtained other information on the same subject, where that information did not disclose the falsity of the representations.<sup>770</sup> Again, an independent investigation counts for nothing as against false representations, where the person making the investigation could learn nothing profitable from it because he lacked the necessary skill, experience, or specialized knowledge. This is the case, for instance, where the subject of the contract is a machine, and the party claiming to have been defrauded inspected and examined it, but was not sufficiently familiar with machinery to judge its capacity or discover its defects.<sup>771</sup> So, the fact that the buyer of a diamond, not being an expert in gems, made a careful examination of it before buying it, does not signify that he did not buy in reliance on the representations of the seller.<sup>772</sup> And where the question concerns a title to real estate, the fact that the purchaser studied an abstract of title furnished to him does not prevent him from obtaining relief against the misrepresentations of the vendor, where, on account of his ignorance of land titles, he was unable to determine the sufficiency of the title from the abstract.<sup>773</sup> On the other hand, though a thorough comprehension of the subject of the contract may require special knowledge or skill, yet an unskilled person

<sup>768</sup> *Newman v. Lyman* (Tex. Civ. App.) 165 S. W. 136. Compare *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799.

<sup>769</sup> *City of Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55.

<sup>770</sup> *Olcott v. Bolton*, 50 Neb. 779, 70 N. W. 366; *Lamb v. Levy*, 77 Wash. 511, 137 Pac. 1024.

<sup>771</sup> *Crutcher v. Schick*, 10 Tex. Civ. App. 676, 32 S. W. 75; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28.

<sup>772</sup> *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34 L. R. A. (N. S.) 1147.

<sup>773</sup> *Buchanan v. Burnett*, 52 Tex. Civ. App. 68, 114 S. W. 406.

examining the subject is chargeable with knowledge of those circumstances which are apparent to persons of ordinary observation. Thus, where the property sold was a mill and its machinery, and the purchaser examined the premises and could and did see that the mill was in a decayed condition, he cannot rescind on the ground of false representations as to the property being in good repair simply because he was not an experienced miller.<sup>774</sup> But the converse of this proposition is also true. That is, if the person investigating is thoroughly familiar or experienced in the particular business or process concerned, he is chargeable with knowledge of all that his trained observation should have taught him.<sup>775</sup> The mere fact that a contract is made subject to investigation by one party does not relieve the other from the consequences of fraudulent representations, unless the means of knowledge are at hand and equally available to both parties.<sup>776</sup> But where one signs a written lease containing a covenant that he has examined and knows the condition of the premises and has received the same in good order and repair, he will not be entitled to rescind the lease on account of false representations as to the condition of the property made before the execution of the lease.<sup>777</sup> An examination of a sample may be equally efficacious in charging the party with knowledge, and precluding relief on the ground of false representations, if the sample was a fair specimen of the article contracted for.<sup>778</sup>

**§ 122. Investigation Prevented or Thwarted by Other Party.**—While many of the cases, as stated in a preceding section, maintain the rule that a person who enters into a contract in implicit reliance on false representations made to him, neglecting to test their accuracy by an investigation or examination which he has a full and free opportunity to make, is chargeable with such negligence as should preclude his claim to relief, yet this rule does not

<sup>774</sup> *Newton v. Levy*, 26 Ky. Law Rep. 476, 82 S. W. 259.

<sup>775</sup> *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086; *Grael v. Wolfe*, 185 Pa. 83, 39 Atl. 819.

<sup>776</sup> *Clark v. Harmer*, 9 App. D. C. 1.

<sup>777</sup> *Jorgeson v. Hock*, 234 Ill. 631, 85 N. E. 296.

<sup>778</sup> *Sands v. Taylor*, 5 Johns. (N. Y.) 395, 4 Am. Dec. 374.



apply in cases where he is dissuaded or prevented from making such an investigation by the artifice, fraud, or misrepresentations of the other party to the contract.<sup>779</sup> For instance, where the defrauded party manifested a disposition to consult his attorney about the validity or effect of certain papers, before concluding the bargain, but was persuaded not to do so by the other party's assurance that it was entirely unnecessary, his reliance on such assurance will not prevent him from obtaining proper relief.<sup>780</sup> So, where the purchaser of property said that he wanted to ascertain whether a cellar on the premises was dry before signing the contract, but the vendor falsely told him that the cellar was dry, that he never had had any trouble with it, and that he might rely on his word, it was held that the purchaser had a right to forego the proposed investigation in reliance on the vendor's statement.<sup>781</sup> And the same rule applies where an investigation was prevented by the other party's urging the necessity for immediate action.<sup>782</sup> So, in an action for fraud inducing the plaintiff to purchase real estate, the evidence showed that the defendant misrepresented the quantity of timber thereon, that plaintiff's agent inspected a part of the land, but did not inspect the balance, because the defendant stated that the timber on

<sup>779</sup> *Tooker v. Alston*, 159 Fed. 599, 86 C. C. A. 425, 16 L. R. A. (N. S.) 818; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444; *Miller v. John*, 111 Ill. App. 56; *Riley v. Bell*, 120 Iowa, 618, 95 N. W. 170; *Evans v. Palmer*, 137 Iowa, 425, 114 N. W. 912; *Thompson v. Randall*, 28 Ky. Law Rep. 716, 90 S. W. 251; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Starkweather v. Benjamin*, 32 Mich. 305; *Leicher v. Keeney*, 98 Mo. App. 394, 72 S. W. 145; *Shearer v. Hill*, 125 Mo. App. 375, 102 S. W. 673; *Dresher v. Becker*, 88 Neb. 619, 130 N. W. 275; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903. As to concealment of material facts, coupled with efforts to prevent discovery, see, *supra*, § 62. On the general rule, see, further, *Everist v. Drake*, 26 Colo. App. 273, 143 Pac. 811; *Barnes v. Barnett*, 188 Ill. App. 32; *Hossier Realty Co. v. Caddo Cotton Oil Co.*, 136 La. 328, 67 South. 20.

<sup>780</sup> *Rollins v. Quimby*, 200 Mass. 162, 86 N. E. 350; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85.

<sup>781</sup> *Frank v. Bradley & Currier Co.*, 42 App. Div. 178, 58 N. Y. Supp. 1032.

<sup>782</sup> *Miller v. John*, 111 Ill. App. 56.

the lands not viewed was better than the portion they were viewing, and that further inspection was omitted in order to enable the parties to return to the station in time to take the only train home that day. It was held that the plaintiff was justified in relying on defendant's representations.<sup>783</sup> Again, if the seller makes any statement intended to distract the buyer's attention from the real facts, and which accomplishes that result, it may complete the fraud and excuse the failure to make an investigation.<sup>784</sup> A suggestion made during the negotiation for a purchase of property, and coupled with false representations by the vendor, that the purchaser should go himself and look at the land, as their judgment might not agree, and if he was not satisfied with the land, the vendor would pay his expenses, but if satisfied, the purchaser should pay them, impliedly asserts that the vendor himself had exercised an intelligent judgment, and, in the absence of any intimation of any possible doubt of the facts being as represented, would be likely to dissuade the purchaser from going and confirm his belief in the representations, and hence cannot operate to shield the vendor from the consequences of his fraud.<sup>785</sup>

Even when a party to a contract does make an independent investigation of the subject-matter, he may still have relief for fraud, if such investigation was thwarted, perverted, or rendered illusory or misleading by the artifice of the other party. In order to have the effect of precluding relief, "the examination must be an untrammelled one, and this is not the case where fraud or concealment is practised in the course of it, or misrepresentations made which would themselves afford occasion for relief. An examination perverted in this way by the act of the vendor is the same as no examination at all."<sup>786</sup> This principle applies where the investigation is rendered illusory and deceptive by the bribery of the agent to whom it was intrusted.<sup>787</sup> An instructive case on this aspect of the question was tried in

<sup>783</sup> *Mannel v. Shafer*, 135 Wis. 241, 115 N. W. 801.

<sup>784</sup> *Files v. Rankin*, 153 Fed. 537, 82 C. C. A. 491.

<sup>785</sup> *Webster v. Bailey*, 31 Mich. 36.

<sup>786</sup> *Mather v. Barnes* (C. C.) 146 Fed. 1000.

<sup>787</sup> *Alger v. Keith*, 105 Fed. 105, 44 C. C. A. 371.

the federal courts, and involved the sale of a silver mine, the alleged false representation being as to the richness and value of the ore. The purchaser sent an experienced mining engineer to inspect the property, and he took samples of the ore for a test assay. The test was made in the seller's mill and in his presence and with his assistance, and he had an opportunity to inject native silver into the sample without being observed, and it was alleged that he had done so. The test exactly confirmed the seller's representation as to the value of the ore, but after the sale, no ore was found in the mine that would assay more than one-fifth as much. A rescission of the sale was decreed. Lurton, J., said: "If the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, actively intervenes to prevent investigation and the discovery of the truth, and such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out. In every such case, immunity will not be extended to false expressions of opinion upon the ground of 'puffing' or 'trade talk,' if it appears that the vendor has, by his conduct, prevented investigation and induced reliance upon the statements of the seller. In such a case, the subsequent conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become a part and parcel of the false statement, and amounts in law to the false affirmation of a fact. A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone or external acts. \* \* \* The gravamen of the alleged fraud lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the active and willful intervention of defendants, their samples were rendered untrustworthy by the secret admixture of silver in a form in which it did not exist in this mine; that the purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements

expressed theretofore as to the silver contents of the mine. Now it must be evident that, if this was done, a most abominable fraud was practised, and that no court would suffer a contract resting upon such a foundation to stand.”<sup>788</sup>

§ 123. **Degree of Care and Vigilance Required.**—It was the old rule, which is still adhered to in some jurisdictions, that a man is bound to exercise ordinary care and diligence to guard against fraud and imposition, and if he fails to do so, he cannot obtain relief in the courts, and that one cannot complain of being deceived by false and fraudulent representations, unless they were of such a nature as would be calculated to deceive an ordinarily or reasonably prudent person.<sup>789</sup> Thus, where the representation concerns the size of a physical object which is present before the eyes of the parties, and any person of ordinary observation can see that the dimensions are not correctly given, there is no legal justification for relying on such statements.<sup>790</sup> So, one who can read and who has an opportunity to read a contract by which he assumes an obligation, but neglects to read it, cannot complain that its contents were falsely stated to him.<sup>791</sup> So, in a case where the owner of a stock of goods in a store induced another to purchase the stock as a whole by falsely representing that the goods were fresh and new, it was said: “It is certainly possible for the owner of a stock of goods to deceive a buyer who could, by examining each parcel by itself, avoid being deceived. All such transactions must be looked at reasonably. One who is as prudent on the particular occasion as most pru-

<sup>788</sup> *Mudsill Mining Co. v. Watrous*, 61 Fed. 163, 9 C. C. A. 415.

<sup>789</sup> *Press v. Hair*, 133 Ill. App. 528; *Clodfelter v. Hulett*, 72 Ind. 137; *Judd v. Walker*, 114 Mo. App. 128, 89 S. W. 558; *Alvin Fruit & Truck Ass'n v. Hartman*, 146 Mo. App. 155, 123 S. W. 957; *Camren v. Squires*, 174 Mo. App. 272, 156 S. W. 773; *Conway Nat. Bank v. Pease*, 76 N. H. 319, 82 Atl. 1068; *Wheelwright v. Vanderbilt*, 69 Or. 326, 138 Pac. 857; *Ross-Armstrong Co. v. Shaw* (Tex. Civ. App.) 113 S. W. 558; *City of Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200; *Davis v. Henry*, 4 W. Va. 571.

<sup>790</sup> *O. L. Packard Machinery Co. v. Schweiger*, 147 Wis. 67, 132 N. W. 606.

<sup>791</sup> *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499.

dent men would be, and is nevertheless cheated, can hardly be held negligent.”<sup>792</sup> One is not required, therefore, to be on his guard against misrepresentations where the truth of the matter could not have been discovered by the exercise of ordinary care,<sup>793</sup> or by such a casual inspection as a reasonably prudent person would not omit to make,<sup>794</sup> but only by the expenditure of considerable time and research,<sup>795</sup> or by constant and suspicious watching.<sup>796</sup> A party taking a building in exchange for other property is not bound to have it examined by experts to ascertain the cause of its condition, but may rely on the statements of the other party, the latter being entirely familiar with the facts.<sup>797</sup> So, a person buying a stock of merchandise is not negligent in relying on the vendor’s representation that it is new, clean, and fresh, when a large part of it, being old and unsalable stock, was stored in boxes kept out of sight, placed on top shelving in a back room, and safe from view except on the closest inspection.<sup>798</sup>

**§ 124. Rejection of Rule Requiring Ordinary Prudence and Care.**—In many states, and more especially in recent times, the rule requiring the exercise of care and prudence to guard against fraud has been rejected, in favor of the more reasonable doctrine that, where an intention to deceive is shown, and that the false representation did actually deceive the party to whom it was addressed, it is immaterial that its falsity could have been discovered by the exercise of care and proper diligence, or that the misrepresentation would not have deceived a person of ordinary intelligence and caution.<sup>799</sup> It is not necessary for the

<sup>792</sup> *Jackson v. Collins*, 39 Mich. 557.

<sup>793</sup> *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032.

<sup>794</sup> *Jackson v. Armstrong*, 50 Mich. 65, 14 N. W. 702.

<sup>795</sup> *Baker v. Becker*, 153 Wis. 369, 141 N. W. 304.

<sup>796</sup> *Forbes v. Thorpe*, 209 Mass. 570, 95 N. E. 955.

<sup>797</sup> *Chase v. Wolgamot*, 137 Iowa, 128, 114 N. W. 614.

<sup>798</sup> *McDowell v. Caldwell*, 116 Iowa, 475, 89 N. W. 1111.

<sup>799</sup> *Mason v. R. M. Thornton & Co.*, 74 Ark. 46, 84 S. W. 1048; *Lefler v. State*, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300; *State v. Fooks*, 65 Iowa, 196, 452, 21 N. W. 561, 773; *State v. Southall*, 77 Minn. 296, 79 N. W. 1007; *State v. Montgomery*, 56 Iowa, 195, 9 N. W. 120; *Miller v. People*, 22 Colo. 530, 45 Pac. 408; *State v. Stewart*, 9 N. D. 409, 83 N. W. 869; *State v.*

complaining party to show that a reasonably prudent man would have relied on the representations under the same circumstances,<sup>800</sup> nor is it a defense that a man of ordinary ability would not have believed them.<sup>801</sup> "It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail."<sup>802</sup> "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves."<sup>803</sup> Notable in this connection is a ruling of the Supreme Court of Indiana, in which a long line of its own previous decisions was overruled. Said the court: "In England and many of the states, the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence. \* \* \* In reason, and it is believed according to the better modern authorities, a pretense calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, practised on the latter. \* \* \* The great weight of the authorities and the better reason sustain the rule that it is not necessary that the pretense be such as will impose upon a man of ordinary caution, or as cannot be guarded against by ordinary care and prudence. The object and purpose of the law is to protect not only the man of ordinary care and prudence, but also the weak and credulous against the strong, the ignorant, inexperienced, and unsuspecting against the experienced and unscrupulous. \* \* \* An inexperienced person, a child, or a feeble old man might

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Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23; People v. Sully, 5 Parker, Cr. R. (N. Y.) 142; Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762; Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074, 115 Am. St. Rep. 1010; Queen v. Wickham, 10 Ad. & El. 34; Regina v. Woolley, 1 Den. C. C. 5; Davis v. Mitchell, 72 Or. 165, 142 Pac. 788; Rogers v. Rosenfeld, 158 Wis. 285, 149 N. W. 33.

<sup>800</sup> Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

<sup>801</sup> State v. Starr, 244 Mo. 161, 148 S. W. 862.

<sup>802</sup> Regina v. Woolley, 1 Den. C. C. 559.

<sup>803</sup> McKee v. State, 111 Ind. 378, 12 N. E. 510.

be induced to part with his property by false pretenses so flimsy and absurd as not to influence a man of ordinary prudence, and the falsity of which would at once be apparent to a man of experience. Still, if the representations were such as to secure the credit of such a person and deprive him of the possession of his property, no matter how absurd such representations may appear to a person of more experience and of greater sagacity, they would be such representations as are contemplated by the statute.”<sup>804</sup>

**§ 125. Relative Situation of Parties as to Mental and Business Capacity.**—From what has been said in the two preceding sections, it will be perceived that the inflexible rules of the common law are gradually but surely giving way to the more enlightened doctrines of equity. The common law, in regard to the exercise of vigilance to detect and guard against fraud, sets up a purely artificial standard of conduct to which every person is expected to conform, that, namely, of the “man of ordinary care and prudence.” If the victim of a fraud happens not to be a person of ordinary care and prudence, it is so much the worse for him and so much the better for the person who has defrauded him. But by the principles of equity, every case is to be determined according to its own particular circumstances, and it is eminently proper, and necessary to a right decision, to take into account the relative situation of the parties with reference to mental capacity, experience, shrewdness, and native cunning. The test should therefore be, whether or not the false representations were such as were calculated to deceive a person of such a degree of intelligence and experience as the defrauded party did actually possess, and were such as a person of that measure of intelligence might well be supposed to accept and rely on, and not whether he might have discovered their falsity by the exercise of care and vigilance.<sup>805</sup> This principle is vig-

<sup>804</sup> *Lefler v. State*, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St. Rep. 300.

<sup>805</sup> *Pye v. Pye*, 133 Ga. 246, 65 S. E. 424; *Foster v. State*, 8 Ga. App. 119, 68 S. E. 739; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Lefler v. State*, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424, 74 Am. St.



orously stated by the Supreme Court of Vermont in the following terms: "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool."<sup>806</sup> So a distinguished text-writer remarks: "It has been said that a false representation, to impose liability on its maker, must have been calculated to impose on a person of ordinary sagacity. But this limitation cannot be sustained, as persons of less than ordinary sagacity are as much entitled to be sheltered from swindlers as are persons of greater shrewdness. Hence, if a party is really imposed upon, and has not in fact negligently exposed himself to imposition, he can obtain redress if damaged by fraudulent representations whose unreality a person of greater intelligence would have promptly discovered."<sup>807</sup> "It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow-men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. \* \* \* It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching, and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they did not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose."<sup>808</sup>

Many other such declarations are to be found in the reports, as, that it is as much actionable fraud willfully to de-

Rep. 300; *McDowell v. Commonwealth*, 136 Ky. 8, 123 S. W. 313; *Banaghan v. Malaney*, 200 Mass. 46, 85 N. E. 839, 19 L. R. A. (N. S.) 871, 128 Am. St. Rep. 378; *Crips v. Towsley*, 73 Mich. 395, 41 N. W. 332; *King v. Cohorn*, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455; *Regina v. Woolley*, 1 Den. C. C. 559.

<sup>806</sup> *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832.

<sup>807</sup> 1 Wharton, Contracts, § 245.

<sup>808</sup> *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799.

ceive a credulous person with an improbable story as to deceive a cautious person with a plausible one;<sup>809</sup> that the law does not allow a shrewd and designing person to hide his evil-mindedness behind the ignorance of his victim;<sup>810</sup> that important business transactions between a shrewd and active business man and ignorant persons poorly equipped to trade with him will be closely scrutinized;<sup>811</sup> and that, in an action for false representations, the impression made on the mind of the person deceived is the subject of inquiry, and he is or is not justified in acting on such representations as they may have impressed him, and not as they may have impressed a disinterested bystander.<sup>812</sup> So, the court in Florida rules that, where the circumstances clearly show the inequality of the contracting parties, by reason of inexperience or lack of information as compared with the business qualities and information of the other party, specific performance of a contract, based on manifestly inadequate consideration, will not be granted.<sup>813</sup> And elsewhere it is said that a treaty respecting an important interest, conducted by two persons of unequal powers,—one with a naturally unsound judgment, rendered still weaker by a long-continued habit of intoxication, and the other enterprising, keen, and sagacious in business, the weaker mind trusting the stronger, that influence increased by pecuniary embarrassment on the one side and pecuniary power on the other, and resulting in a contract exhibiting great inadequacy of consideration,—presents a claim to equitable relief.<sup>814</sup>

Applying these principles to the facts of actual cases, we find the courts granting relief to persons deceived and injured by false representations, although they did not exhibit ordinary care and prudence in the matter, where, as against superior intelligence or capacity, the victim was a woman, ignorant or entirely inexperienced in business af-

<sup>809</sup> *Prescott v. Brown*, 30 Okl. 428, 120 Pac. 991.

<sup>810</sup> *Robinson v. Reinhart*, 137 Ind. 674, 36 N. E. 519.

<sup>811</sup> *Prater v. Peters*, 31 Ky. Law Rep. 1311, 105 S. W. 102.

<sup>812</sup> *Britton v. Poore*, 57 Fla. 45, 49 South. 507.

<sup>813</sup> *Gaskins v. Byrd*, 66 Fla. 432, 63 South. 824.

<sup>814</sup> *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

fairs,<sup>815</sup> or an infant, tricked by reason of his youth and inexperience,<sup>816</sup> or an aged, weak, and illiterate person,<sup>817</sup> or a person unfamiliar with business and of less than average mental capacity,<sup>818</sup> or a person unable to read or speak the English language,<sup>819</sup> or slow-witted and understanding English imperfectly,<sup>820</sup> or deaf and unable to read and write,<sup>821</sup> or old and with defective eyesight,<sup>822</sup> or a deaf-mute and unable to communicate with others except by the sign language and of feeble intellect and susceptible to the influence and the arts of others,<sup>823</sup> or one whose intelligence and power of self-protection have become impaired through his habits of frequent intoxication,<sup>824</sup> or simply a person having little or no experience in the particular kind of transactions to which the contract relates.<sup>825</sup> So, representations made by a lawyer to a person who has no knowledge of the law or experience in it may furnish ground for relief, notwithstanding a want of ordinary prudence, particularly where they relate to matters of law,<sup>826</sup> or even where they relate to mere matters of business, if the party duped is a client and accustomed to trust his attorney and rely on his statements.<sup>827</sup> And a deed of lands for less than their real value, given to one who was greatly the superior of the grantor in intelligence and who, sustaining confidential relations to him, played on his unwarranted fears of

<sup>815</sup> *Cannon v. Gilmer*, 135 Ala. 302, 33 South. 659; *Yarbrough v. Harris*, 168 Ala. 332, 52 South. 916, Ann. Cas. 1912A, 702; *Grand Rapids, G. H. & M. Ry. Co. v. Stevens*, 143 Mich. 646, 107 N. W. 436; *Stewart v. Hubbard*, 56 N. O. 186; *Varner v. Carson*, 59 Tex. 303; *Schaeffer v. Blanc* (Tex. Civ. App.) 87 S. W. 745.

<sup>816</sup> *Gray v. Lessington*, 15 N. Y. Super. Ct. 257.

<sup>817</sup> *Hunt v. Moore*, 2 Pa. 105.

<sup>818</sup> *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022.

<sup>819</sup> *Adolph v. Minneapolis & P. Ry. Co.*, 58 Minn. 178, 59 N. W. 959; *Bonelli v. Burton*, 61 Or. 429, 123 Pac. 37.

<sup>820</sup> *Blampey v. Pike*, 155 Mich. 384, 119 N. W. 576.

<sup>821</sup> *Carbine v. McCoy*, 85 Ga. 185, 11 S. E. 651.

<sup>822</sup> *Pope v. Florea*, 167 Mo. App. 595, 152 S. W. 96.

<sup>823</sup> *Culley v. Jones*, 164 Ind. 168, 73 N. E. 94.

<sup>824</sup> *Storrs v. Scougale*, 48 Mich. 387, 12 N. W. 502.

<sup>825</sup> *Whitney v. Richards*, 17 Utah, 226, 53 Pac. 1122; *Quimby v. Clock*, 44 App. Div. 616, 60 N. Y. Supp. 253.

<sup>826</sup> *Bridgewater v. Byassee*, 29 Ky. Law Rep. 377, 93 S. W. 35.

<sup>827</sup> *Manley v. Felty*, 146 Ind. 194, 45 N. E. 74.

losing the land by foreclosure, will be set aside.<sup>828</sup> Nor must we omit to mention the case of a man who tamped a charge of blasting powder with an iron bar, and, having survived the result, brought suit for misrepresentations, basing his claim on a statement by the manufacturers and the dealer who sold it to him that the powder was "safe," and was allowed to go to the jury with the question of fact.<sup>829</sup>

§ 126. **Statements Palpably False, Incredible, or Impossible.**—It has sometimes been held that an action for deceit or a claim for rescission could not be predicated upon misrepresentations which were so incredible, or so palpably false or impossible, that they could not be assumed to have deceived a person having the least measure of intelligence which would enable him to contract at all.<sup>830</sup> Thus, it is said that no action of fraud lies on representations made on a sale of eyeglasses, to the effect that a chemical process imparted a quality to the glass which made it fit the eye indefinitely, so that the glasses, once fitted, would always adapt themselves to the eye, such statement being contrary to natural laws.<sup>831</sup> So it has been ruled that one who is invited to subscribe for stock in a corporation is bound to bring to bear upon the proposition a reasonable measure of care and good judgment, so that he cannot complain of having been deceived by statements which were preposterous or incredible on their face.<sup>832</sup> But the better rule, and one which is in line with the modern doctrine explained in the preceding section, is that the improbability or incredibility of a misrepresentation is ordinarily only relevant on the question of its acceptance as true by the other party and its influence on his conduct (which is a question of fact for the jury), and never of itself precludes a right of action.<sup>833</sup>

<sup>828</sup> *Smith v. Firth*, 53 App. Div. 369, 65 N. Y. Supp. 1096.

<sup>829</sup> *Marsh v. Usk Hardware Co.*, 73 Wash. 543, 132 Pac. 241.

<sup>830</sup> *Leonard v. Southern Power Co.*, 155 N. C. 10, 70 S. E. 1061. And see *Peterson v. Hoftlezer*, 35 S. D. 101, 150 N. W. 934.

<sup>831</sup> *H. Hirschberg Optical Co. v. Michaelson*, 1 Neb. (Unof.) 137, 95 N. W. 461.

<sup>832</sup> *New Brunswick & Canada Ry. v. Muggeridge*, 1 Dr. & Sm. 363; *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. App. 99.

<sup>833</sup> *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 South. 143; *State Life Ins. Co. v. Johnson*, 73 Kan. 567, 85 Pac. 597.

Thus, in a case in Vermont, the article sold was a perpetual-motion machine, the motion being produced by a concealed clock-work. The buyer, on discovering the cheat, sued for the recovery of his money, and the suit was defended on the ground that the buyer was bound, as matter of common sense, to know that the thing was a fraud. But the court sustained a recovery, saying that "the law will afford relief even to the simple and credulous who have been duped by art and falsehood."<sup>834</sup> In another case, a skilled mechanic contracted to put a tin roof on a building which should last twenty years without leaking. It was held that he could not escape liability on the ground that his representations were incapable of being made good. The court conceded that no action would lie upon a representation "obviously ridiculous and impracticable," but said that the representation here in question was "not manifestly absurd and essentially impracticable in the nature of things," and further that the injured party had a right to rely on the representations of the defendant as relating to "matters peculiarly within his knowledge, pertaining to his art or calling."<sup>835</sup> Again, where a person who was a promoter and director of a corporation and who knew perfectly well that it was a worthless concern, and would never earn or pay any dividends, gave a written guaranty that shareholders would receive a minimum annual dividend of 33 per cent, and this was done to induce people to buy its stock, a person who relied on this representation and invested his money and lost it was held entitled to maintain an action for deceit.<sup>836</sup> So, a representation that a worthless medicine is a sure cure for cholera is a misrepresentation of fact and is actionable.<sup>837</sup> And a "clair-voyant" who by false and fraudulent representations, knowingly and with intent to defraud, induced a woman to place in his care money which he did not return, was held guilty of false pretenses.<sup>838</sup>

<sup>834</sup> *Kendall v. Wilson*, 41 Vt. 567.

<sup>835</sup> *McGar v. Williams*, 26 Ala. 409, 62 Am. Dec. 739.

<sup>836</sup> *Gerhard v. Bates*, 2 Et. & Bl. 490.

<sup>837</sup> *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

<sup>838</sup> *Clarke v. People*, 53 Colo. 214, 125 Pac. 113.

## CHAPTER IV

### MISTAKE, INADVERTENCE, ACCIDENT, AND SURPRISE.

- § 127. Mistake as Ground for Rescission.
- 128. Mutual and Unilateral Mistakes.
- 129. Mistake of One Party Induced by Fraud or Artifice of Other.
- 130. Unilateral Mistake Known to and Taken Advantage of by Other Party.
- 131. Mistake Attributable to Party's Own Negligence or Inattention.
- 132. Mistake of Both Parties.
- 133. Mutual Ignorance of Material Facts.
- 134. Materiality of Mistake.
- 135. Mistakes of Agents.
- 136. Mistake in Transmission of Telegram.
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- 138. Mistake as to Identity of Party.
- 139. Mistake as to Existence of Subject-Matter.
- 140. Mistake as to Identity of Subject-Matter.
- 141. Mistake as to Price or Value of Subject-Matter.
- 142. Errors in Computations or Estimates.
- 143. Mistakes as to Title.
- 144. Mistake as to Quantity of Land Conveyed.
- 145. Inadvertence.
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- 147. Mistake in Matter of Law.
- 148. Same; Mistake or Ignorance as to Party's Legal Rights.
- 149. Same; Mistake as to Legal Effect of Instrument.
- 150. Same; Mistake of Law Induced by Other Party.
- 151. Same; Mistake of Law as Element of Fraud.
- 152. Same; Mutual Mistake of Law.
- 153. Same; Laws of Foreign State or Country.
- 154. Loss or Injury Resulting from Mistake.
- 155. Evidence to Prove Mistake.
- 156. Accident or Surprise as Ground for Relief.

§ 127. Mistake as Ground for Rescission.—It is within the jurisdiction of a court of equity to give relief by enforcing the rescission of a contract or the cancellation of a conveyance or other written instrument on the ground of mistake, where the mistake is one of fact, material to the substance of the transaction, and mutual (or, if existing on one side only, known to the other party or induced by his fraud), and where it is not attributable to the negligence of the mistaken party nor resulting from his own violation of



some legal duty.<sup>1</sup> It is even said that the award of relief against mutual mistake is a favorite subject of equity jurisdiction,<sup>2</sup> and that it is not precluded by the fact that the injured party has a concurrent legal remedy for the same wrong.<sup>3</sup> But in this, as in all other cases, the remedy of rescission cannot be had without restoration of the status quo or restitution. As declared in the statutes of some of the states, "rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made,"<sup>4</sup> or in cases where he has not materially changed his position relative to the subject-matter.<sup>5</sup> Thus, where one holding the senior lien on a piece of property and who executed a release of a deed of trust thereon, had no intention of surrendering his lien in favor of a junior lien in the hands of one S., but gave the release in the belief that S. had no lien, it was held that he was entitled to a cancellation of the release, since it would not operate prejudicially to any one but S., and would place him in the same position he occupied before it was executed.<sup>6</sup>

Within these rules, a "mistake" is an erroneous conviction arising in the mind of a party through ignorance, inadvertence, or forgetfulness, or as the result of an error in

<sup>1</sup> *Daniel v. Mitchell*, 1 Story, 172, Fed. Cas. No. 3,562; *Reddick v. Long*, 124 Ala. 260, 27 South. 402; *Boney v. Hollingsworth*, 23 Ala. 690; *Humphrey v. Gerard*, 83 Conn. 346, 77 Atl. 65; *Barker v. Fitzgerald*, 105 Ill. App. 536; *Norton Iron Works v. Moreland* (Ky.) 113 S. W. 481; *Selleck v. Macon Compress & Warehouse Co.*, 72 Miss. 1019, 17 South. 603; *Whelen's Appeal*, 70 Pa. 410; *Lies v. Stub*, 6 Watts (Pa.) 48; *Murray Co. v. Putman* (Tex. Civ. App.) 130 S. W. 631; *Ferrell v. Delano* (Tex. Civ. App.) 144 S. W. 1039; *Hurd v. Hall*, 12 Wis. 112. See *Blehl v. Glick*, 17 Ill. 35. "In all cases of a mistake of fact material to the contract, or other matter affected by it, if the party complaining applies within a reasonable time, equity will relieve." Civ. Code Ga. 1910, § 4580. And see *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300.

<sup>2</sup> *Tazewell Coal & Iron Co. v. Gillespie*, 113 Va. 134, 75 S. E. 757. But compare *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300.

<sup>3</sup> *Wilson v. McConnell*, 72 W. Va. 81, 77 S. E. 540.

<sup>4</sup> Civ. Code Cal., § 3407; Rev. Civ. Code Mont., § 6113; Rev. Civ. Code N. Dak., § 6624; Rev. Civ. Code S. Dak., § 2354.

<sup>5</sup> *Dunn v. City of Superior*, 148 Wis. 636, 135 N. W. 145.

<sup>6</sup> *Troll v. Sauerbrun*, 114 Mo. App. 323, 89 S. W. 364.



computation, or a genuine but unfounded belief as to the existence or non-existence of a particular fact.<sup>7</sup> According to certain statutory definitions, "mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in (1) an unconscious ignorance or forgetfulness of a fact past or present, or (2) belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed."<sup>8</sup> But a person cannot obtain the cancellation of a deed as having been executed by mistake, where the evidence shows that he fully understood its purpose and intention at the time of execution, but has since changed his mind as to the propriety or expediency of his act.<sup>9</sup> It sometimes happens that a written contract will itself contain a stipulation that it shall not be revocable for mistakes or errors. But in several states it is provided by law that "a stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation."<sup>10</sup>

§ 128. **Mutual and Unilateral Mistakes.**—A "mutual" mistake (more properly called "common") exists where both or all the parties to a transaction are laboring under the same misapprehension or erroneous belief in regard to a particular fact or circumstance; that is, it is a mistake shared by all the parties alike.<sup>11</sup> A "unilateral" mistake

<sup>7</sup> See *Cummins v. Bulgin*, 37 N. J. Eq. 476; *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29; *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Davis v. Steuben School Tp.*, 19 Ind. App. 694, 50 N. E. 1. It appears that mistakes of judgment are not to be included in the definition. See *Brown Bros. Mfg. Co. v. S. H. Harris Co.*, 185 Ill. App. 568. See, *infra*, § 142.

<sup>8</sup> Civ. Code Cal., § 1577; Rev. Civ. Code Mont., § 4983; Rev. Civ. Code N. Dak., § 5298; Rev. Civ. Code S. Dak., § 1206; Rev. Laws Okl. 1910, § 908. And see *Peasley v. McFadden*, 68 Cal. 611, 10 Pac. 179; *Calhoun v. Teal*, 106 La. 47, 30 South. 288.

<sup>9</sup> *Raab v. Raab*, 23 Ky. Law Rep. 971, 64 S. W. 624.

<sup>10</sup> Civ. Code Cal., § 1690; Rev. Civ. Code Mont., § 5064; Rev. Civ. Code N. Dak., § 5379; Rev. Civ. Code S. Dak., § 1284; Rev. Laws Okl. 1910, § 985.

<sup>11</sup> *Botsford v. McLean*, 45 Barb. (N. Y.) 478; *Wilson v. Wilson*, 23

exists where one of the parties is laboring under such a misapprehension or erroneous belief, but the other has a clear comprehension of the subject-matter; that is, it is a mistake of one party not shared by the other.<sup>12</sup> Now it is a settled principle of equity that a contract or deed cannot be reformed for mistake unless the mistake was mutual, in the sense above defined. But many courts have thought that a distinction should be recognized between the reformation and the rescission of a contract, and that the latter remedy might be granted even in a case where the former could not be claimed for want of mutuality in the mistake, in other words, that rescission may be granted in the case of a purely unilateral mistake, provided it did not result from the party's own negligence.<sup>13</sup> And this rule has been enacted into law in at least one of the states.<sup>14</sup> It is subject, however, to the qualification that the mistake must be one which would defeat the real agreement of the parties,<sup>15</sup> and that rescission can be effected without positive injustice to the adverse party.<sup>16</sup>

But at present it must be said that this doctrine is opposed by the great preponderance of the authorities. The generally accepted rule is that rescission cannot be enforced or

Nev. 267, 45 Pac. 1009; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; *Tarbox v. Tarbox*, 111 Me. 374, 89 Atl. 194.

<sup>12</sup> For example, where an offer was made by one partner to enter into a contract with another person to remove earth at a stipulated price per cubic yard from a line of railroad in process of construction, the fact that, before the offer was made, the other partner had already let a contract for a small portion of the offered work, which was unknown to the partner making the offer, does not constitute a mutual mistake between the parties to the contract. *Lamoreaux v. Phelan*, 89 Neb. 47, 130 N. W. 988.

<sup>13</sup> *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; *Crosby v. Andrews*, 61 Fla. 554, 55 South. 57, Ann. Cas. 1913A, 420; *Wirsching v. Grand Lodge*, 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119, 3 Ann. Cas. 442; *Hayward v. Wemple*, 152 App. Div. 195, 136 N. Y. Supp. 625; *Manhattan Wrecking & Contracting Co. v. Eldlitz*, 78 Misc. Rep. 396, 138 N. Y. Supp. 308; *Harper v. City of Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59. See *Stone v. Moody*, 47 Wash. 158, 91 Pac. 644.

<sup>14</sup> "Equity will not reform a written contract unless the mistake is shown to be the mistake of both parties; but it may rescind and cancel upon the ground of mistake of fact material to the contract of one party only." Civ. Code Ga. 1910, § 4579.

<sup>15</sup> *Engel v. Powell*, 154 Mo. App. 233, 134 S. W. 74.

<sup>16</sup> *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135.

ordered on account of the mistake of one party only, which the other did not share, but for which he was not responsible, unless some special ground for the interference of a court of equity can be shown.<sup>17</sup> That is, there can be no rescission on account of the mistake of one party only, where the other party was not guilty of any fraud, concealment, undue influence, or bad faith, did not induce or encourage the mistake, and will not derive any unconscionable advantage from the enforcement of the contract.<sup>18</sup> "A court of equity," it has been said, "cannot undertake to make a contract for parties which they have not made themselves, and would equally transcend its just powers by compelling a party to relinquish the fruits of a contract which he has honestly made, and in which there is no taint of wrong to affect his conscience. The rescission or cancellation of a contract is certainly as drastic an interference with its provisions as a modification of it. The consequences may be equally or even more injurious to the party who is

<sup>17</sup> *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 91 Fed. 28, 33 C. C. A. 319; *Soper v. Tyler*, 77 Conn. 104, 58 Atl. 699; *De Grasse v. H. W. Gossard Co.*, 152 Ill. App. 58; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28; *Duff & Oney v. Rose*, 149 Ky. 482, 149 S. W. 884; *Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Vallentyne v. Immigration Land Co.*, 95 Minn. 195, 103 N. W. 1028, 5 Ann. Cas. 212; *Weissenfels v. Cable*, 208 Mo. 515, 106 S. W. 1028; *Hand v. Gas Engine & Power Co.*, 167 N. Y. 142, 60 N. E. 425; *John Monks & Sons v. West Street Improvement Co.*, 149 App. Div. 504, 134 N. Y. Supp. 39; *Cohen v. Haberman*, 126 App. Div. 710, 111 N. Y. Supp. 67; *Stewart v. Dunn*, 77 App. Div. 631, 79 N. Y. Supp. 123; *Lumber Exchange Bank v. Miller*, 18 Misc. Rep. 127, 40 N. Y. Supp. 1073; *Livingston v. New York Life Ins. & Trust Co.*, 59 Hun, 622, 13 N. Y. Supp. 105; *Ebstein v. Philadelphia Knitting Mills Co.*, 48 Pa. Super. Ct. 349; *Anthony v. Granger*, 22 R. I. 359, 47 Atl. 1091; *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431; *Houston & T. C. Ry. Co. v. Burns* (Tex. Civ. App.) 63 S. W. 1035; *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978; *White v. Snell*, 35 Utah, 434, 100 Pac. 927; *Briggs v. Watkins*, 112 Va. 14, 70 S. E. 551.

<sup>18</sup> *Ellicott Mach. Co. v. United States*, 44 Ct. Cl. 127; *Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; *Schroeppel v. Steinmeyer*, 128 Ill. App. 146; *Hutchinson v. Bambas*, 249 Ill. 624, 94 N. E. 987; *Wilson v. Storm*, 164 Ill. App. 13; *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303; *Thompson v. E. I. Dupont Co.*, 100 Minn. 367, 111 N. W. 302; *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103. And see *Outcalt Advertising Co. v. J. W. Hooten & Co.*, 11 Ala. App. 454, 66 South. 901.

deprived of the benefit to which he is entitled by it, and there is no sound reason, and, as we think, no well-considered authority, for the proposition that, although a court of equity will not reform a contract except for the mistake of both parties, it will rescind one merely for the mistake of one party.”<sup>19</sup> And in the same case it was said: “A very extended examination of the reports has failed to disclose a case in which a judgment rescinding a contract has proceeded solely upon the ground that the terms as reduced to writing, although expressing the understanding of one party, did not express that of the other. In all the reported cases where there was not the element of mutual mistake, or mistake on one side with knowledge on the other, there was some undue influence, misrepresentation, surprise, or abuse of confidence, or the contract was so oppressive as to be unconscionable.”

Where parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party such as would affect any other contract.<sup>20</sup> So, a contract to report the testimony at a judicial hearing at a stated sum per folio cannot be rescinded merely because one of the parties did not understand the meaning of the word “folio.”<sup>21</sup> And a misunderstanding between the parties to a contract for the furnishing of a lot of square-edged lumber, as to whether boards and plank square-edged at one side and wany-edged at the other are “square-edged” lumber, will not give either party the right to rescind.<sup>22</sup> On the other hand, where a purchaser orders a quantity of scrap iron, and by mistake there is included in the shipment certain mill machinery consigned to a third person, and the

<sup>19</sup> *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 91 Fed. 28, 33 C. C. A. 319.

<sup>20</sup> *Ancient Order of United Workmen v. Mooney*, 230 Pa. 16, 79 Atl. 233.

<sup>21</sup> *Law Reporting Co. v. Texas Grain & Elevator Co.* (Tex. Civ. App.) 168 S. W. 1001.

<sup>22</sup> *Montgomery v. Ricker*, 43 Vt. 165.

purchaser pays for the whole as scrap iron, this will not pass title to the machinery to him where neither he nor the seller has any such intention.<sup>23</sup>

**§ 129. Mistake of One Party Induced by Fraud or Artifice of Other.**—A mistake of fact in a material particular, though existing in the mind of only one of the parties, will be sufficient ground for rescission or cancellation, when the fraud, artifice, or trick of the other party induced him to fall into the mistake originally or encouraged him to persist in it, or prevented its discovery.<sup>24</sup> Thus, for instance, where the terms of a contract are discussed and settled between the parties in conversation, and afterwards embodied in a written memorandum, and one of them is not aware that an important provision, materially affecting his interests, has been omitted from the writing, it is a mistake on his part; but if that provision was purposely and fraudulently omitted by the act or instigation of the other party, it is a fraud justifying the rescission of the contract.<sup>25</sup> Again, if one of the parties induces the other to fall into a misapprehension or erroneous belief in regard to the substance or terms of the contract, by fraudulently concealing from him material facts which are within his own knowledge, and which would have influenced the decision of such other party, a case is made out for equitable relief.<sup>26</sup> But it must be remembered that, in the absence of misrepresentation or fraud, ignorance of a fact known to the opposite party will not justify the interposition of equity, unless there is some reason why the injured party should have relied on the former for information, and, so relying, was deceived either by words or conduct.<sup>27</sup> But it is a clear case of fraud and imposition where one of the parties, being fully acquainted with the subject-matter and aware of what

<sup>23</sup> *Harris v. Hackley*, 127 Mich. 46, 86 N. W. 389.

<sup>24</sup> *Bogardus v. Grace* (C. C.) 78 Fed. 856; *Jenkins v. German Lutheran Congregation*, 58 Ga. 125; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799; *Powell v. Plant* (Miss.) 23 South. 399.

<sup>25</sup> *Dickson v. Lambert*, 98 Ind. 487.

<sup>26</sup> See, *supra*, §§ 58-63. And see *Curry v. Greffet*, 115 Mo. App. 364, 90 S. W. 1166.

<sup>27</sup> *Keith v. Brewster*, 114 Ga. 176, 39 S. E. 850.

he is doing, induces or encourages the other to fall into a material mistake by taking advantage of his illiteracy, impaired physical or mental faculties, age, weakness, or confiding disposition.<sup>28</sup>

**§ 130. Unilateral Mistake Known to and Taken Advantage of by Other Party.**—Where one of the parties to a contract is laboring under a material mistake as to a matter of fact, and the other party is aware of the mistake, and seeks to take advantage of it, knowing that the enforcement of the contract as made will result in an unwarrantable advantage to himself, with corresponding loss to the other party, his conduct is so unconscionable as to justify the interference of a court of equity to rescind the contract or prevent its enforcement.<sup>29</sup> As remarked in one of the cases, equity will sometimes relieve a person from the consequences of his unfortunate blunder, but will never enable another to take advantage of it.<sup>30</sup> Where the party to whom an offer is made is fully aware that it has been made under a mistake, and would not have been made but for such mistake, he cannot, by accepting it with such knowledge, hold the other to a binding contract. Thus, where, by a clerical error, the price at which defendant offered to sell seed was a dollar per hundredweight too low, and the plaintiff accepted the offer knowing that it must have been a mistake, he cannot recover for defendant's failure to perform.<sup>31</sup> So where a letter quoted flour for immediate acceptance at "\$5.10 jute or \$6.00 bulk," such quotation disclosed a mis-

<sup>28</sup> *Brun v. Brun*, 64 Neb. 782, 90 N. W. 860; *Carbine v. McCoy*, 85 Ga. 185, 11 S. E. 651; *Tennelly v. Tennelly* (Ky.) 7 S. W. 394.

<sup>29</sup> *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S. E. 755; *Wilson v. Wyoming Cattle & Investment Co.*, 129 Iowa, 16, 105 N. W. 338; *Ison v. Wolf*, 153 Ky. 650, 156 S. W. 129; *Brown v. Gelger*, 3 Ky. Law Rep. 239; *C. H. Young Co. v. Springer*, 113 Minn. 382, 129 N. W. 773; *Murray v. Crooks*, 79 Mo. App. 89; *Scott v. Hall*, 60 N. J. Eq. 451, 46 Atl. 611; *Smith v. Mackin*, 4 Lans. (N. Y.) 41; *Rider v. Powell*, 28 N. Y. 310; *Altgelt v. Gerbic* (Tex. Civ. App.) 149 S. W. 233; *Webster v. Cecil*, 30 Beav. 62. See *Cunningham v. Atterbury*, 166 Mo. App. 137, 148 S. W. 176; *Toop v. Palmer*, 97 Neb. 802, 151 N. W. 301.

<sup>30</sup> *Hayden v. Lauffenburger*, 157 Mo. 88, 57 S. W. 721.

<sup>31</sup> *Barteldes Seed Co. v. Bennett-Sims Mill & Elevator Co.* (Tex. Civ. App.) 161 S. W. 399.

take on its face as to flour in jute sacks, and the other party, an experienced flour buyer, could not create a binding contract by accepting the offer for delivery in sacks.<sup>32</sup> So, where a note is given in settlement of a balance mistakenly supposed by the maker to exist in favor of the payee, when in fact nothing is due, this fact is a defense in an action on the note.<sup>33</sup> In another case, a life insurance policy provided that, if any premium note should not be paid when due, the policy should be void without notice or action of the company. The insured gave his note for half the first premium, and declined to pay it, and in a suit thereon claimed that it had been procured by fraud, and recovered judgment for all that had not been earned by his insurance prior to repudiating the contract. The insurer by mistake continued the policy on its books, and sent the insured a formal notice indicating the date on which the next premium would be due. He was at that time dangerously ill, and sent a check for the second premium, which the insurance company received on the day he died. It was held that the insurer was not liable on the policy.<sup>34</sup>

**§ 131. Mistake Attributable to Party's Own Negligence or Inattention.**—A party cannot have relief against a contract or other obligation into which he has entered in ignorance of material facts, or under a mistake as to such facts, where no fraud or imposition was practised upon him, and his ignorance or mistake is entirely due to his own negligence or lack of proper attention, or to the failure to exercise such reasonable care and thoughtfulness as may be expected in business transactions from men of ordinary care and prudence.<sup>35</sup> Thus, for example, one who is too careless

<sup>32</sup> *Buckberg v. Washburn-Crosby Co.*, 115 Mo. App. 701, 92 S. W. 733.

<sup>33</sup> *Wildermann v. Donnelly*, 86 Minn. 184, 90 N. W. 366.

<sup>34</sup> *Citizens' Life Ins. Co. v. Riley* (Ky.) 124 S. W. 402.

<sup>35</sup> *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85; *Montgomery v. City Council of Charleston*, 99 Fed. 825, 40 C. C. A. 108, 48 L. R. A. 503; *Royston v. Miller* (C. C.) 76 Fed. 50; *Illingworth v. Spaulding* (C. C.) 43 Fed. 827; *Pittsburg Steel Co. v. Wood*, 109 Ark. 537, 160 S. W. 519; *United States Trust Co. v. David*, 36 App. D. C. 549; *Keith v. Brewster*, 114 Ga. 176, 39 S. E. 850; *National Union Fire Ins. Co. v. John Spry Lumber Co.*, 235 Ill. 98, 85 N. E. 256; *Benting v.*



or too confiding to acquaint himself with the contents of a written instrument presented to him for his signature, or to have it read aloud and explained to him if he cannot read it for himself, cannot ordinarily base a claim to relief in equity on the fact that he was mistaken as to its identity, terms, or purport.<sup>86</sup> The rule is sometimes stated in this form: A party cannot rescind or repudiate a contract for a mistake which existed in his own mind alone, where no fraud was practised, and where each of the parties had equal and adequate means of information, and each is presumed to pay attention and exercise his own judgment on

Bell, 137 Ill. App. 600; *Williamson v. Hitner*, 79 Ind. 233; *Robinson v. Glass*, 94 Ind. 211; *Wood v. Wack*, 31 Ind. App. 252, 67 N. E. 562; *Minneapolis & St. L. Ry. Co. v. Cox*, 76 Iowa, 306, 41 N. W. 24, 14 Am. St. Rep. 216; *Bevins v. J. A. Coates & Sons*, 29 Ky. Law Rep. 978, 96 S. W. 585; *Brown v. Geiger*, 3 Ky. Law Rep. 239; *Gougenheim's Heirs v. Ermann*, 118 La. 577, 43 South. 170; *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303; *Wood v. Patterson*, 4 Md. Ch. 335; *Nordyke & Marmon Co. v. Kehler*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600; *Donnelly v. Missouri-Lincoln Trust Co.*, 239 Mo. 370, 144 S. W. 388; *Troll v. Sauerbrun*, 114 Mo. App. 323, 89 S. W. 364; *Farrell v. Bouck*, 72 Neb. 875, 101 N. W. 1018; *Byers v. Chapin*, 28 Ohio St. 300; *Hughey v. Smith*, 65 Or. 323, 133 Pac. 68; *Diman v. Providence, W. & B. R. Co.*, 5 R. I. 130; *Dow v. Ker*, *Speers Eq. (S. C.)* 413; *Hellbron v. Bissell*, 1 Bailey Eq. (S. C.) 430; *Ferrell v. Ferrell*, 53 W. Va. 515, 44 S. E. 187; *Taylor v. Godfrey*, 62 W. Va. 677, 59 S. E. 631; *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N. W. 264. Requirement of exercise of due care and diligence to detect and avoid fraud, see, *supra*, §§ 39, 40. Negligence of injured party as defense to charge of false and fraudulent representations, see, *supra*, §§ 113, 123.

<sup>86</sup> *Hickman v. Sawyer*, 216 Fed. 281, 132 O. C. A. 425; *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Robinson v. Glass*, 94 Ind. 211; *Constantine v. McDonald*, 25 Idaho, 342, 137 Pac. 531; *McCormack v. Molburg*, 43 Iowa, 561; *McKinney v. Boston & M. R. Co.*, 217 Mass. 274, 104 N. E. 446; *Porter v. Woods*, 138 Mo. 539, 39 S. W. 794; *Ely v. Sutton*, 177 Mo. App. 546, 162 S. W. 755; *International Text-Book Co. v. Anderson*, 179 Mo. App. 631, 162 S. W. 641; *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313; *McDonald v. McKinney Nursery Co.*, 44 Okl. 62, 143 Pac. 191; *Berry v. Planters' Bank*, 3 Tenn. Ch. 69; *McMillen v. Strange*, 159 Wis. 271, 150 N. W. 434; *Ross v. Northrup, King & Co.*, 156 Wis. 327, 144 N. W. 1124. Compare *Truax v. Estes (C. C.)* 92 Fed. 529. And see *Wirsching v. Grand Lodge*, 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119, 3 Ann. Cas. 442. For the general rules as to negligence in signing a contract or other written instrument without reading it or having it read, see, *supra*, §§ 52-56.

the subject-matter.<sup>37</sup> In other words, to authorize a court of equity to decree rescission or cancellation on the ground of mistake, based on a mistaken belief of one of the parties, that belief must be a fair and reasonable one and justified by facts adequate to inspire it.<sup>38</sup> Or, to put it differently, a party is guilty of inexcusable carelessness where he has within his own hands every means to enable him to avoid a material mistake into which he nevertheless falls.<sup>39</sup> And a person cannot be said to have entered into a contract by mistake, in such sense as to justify his repudiation of it, though he has failed to notice a material fact which would have influenced his decision, where such fact was plainly discoverable as a mere matter of inference or of computation from the facts freely furnished to him by the opposite party.<sup>40</sup>

Thus, for instance, where a judgment creditor, having the judgment debt secured by mortgage, purchases the equity of redemption subject to incumbrances between his mortgage and judgment, through ignorance of the existence of his own mortgage, he can have no relief in equity.<sup>41</sup> So the mere want of knowledge of the value of an estate will not justify the setting aside of an inequitable agreement for the division of it among the heirs, in the absence of a showing that the complaining parties did not have ample opportunity to inform themselves of the value and condition of the estate.<sup>42</sup> And a party to a written contract, who thereby assumes obligations created by other contracts reduced to writing, is chargeable with knowledge of the terms of such contracts, having them before him at the time of executing the contract, unless it is shown that he was in some way misled.<sup>43</sup> So, in a case in Ohio, the terms and conditions of a sale of chattels at public auction were materially

<sup>37</sup> *Botsford v. Wilson*, 75 Ill. 132; *Wier v. Johns*, 14 Colo. 493, 24 Pac. 262; *Crowder v. Langdon*, 38 N. C. 476; *Eastman v. St. Anthony Falls Water-Power Co.*, 24 Minn. 437.

<sup>38</sup> *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788.

<sup>39</sup> *Felin v. Fitcher*, 51 Pa. Super. Ct. 233.

<sup>40</sup> *Daly v. Busk Tunnel Ry. Co.*, 129 Fed. 513, 64 C. C. A. 87.

<sup>41</sup> *Deare v. Carr*, 3 N. J. Eq. 513.

<sup>42</sup> *Sackman v. Campbell*, 15 Wash. 57, 45 Pac. 895.

<sup>43</sup> *Blake v. Black Bear Coal Co.*, 145 Ky. 788, 141 S. W. 403.

modified by an oral statement made by the vendor at the commencement of the sale, but the purchaser claimed that he had not heard this statement, or that, if he heard it, he understood it imperfectly. But this was held no defense to an action against him. The court said: "It would be difficult to maintain that a purchaser at a public sale, who so far complies with its terms as to take the property and pay for it, asking no express warranty, could be permitted to show that he did not inform himself of what were the actual terms of the sale, and derive advantage from the want of full and accurate information."<sup>44</sup> Again, a municipal council, after allowing claims against the city with no effort to investigate them, cannot order an investigation and rescind their action and recover back the money paid, because of facts which they did not know, but which they might have ascertained by the exercise of reasonable diligence.<sup>45</sup> It has also sometimes been ruled that a person cannot complain of his mistake, consisting in a want of knowledge of important circumstances, where he is shown to have had knowledge of facts arousing suspicion and suggesting an inquiry, which inquiry, if followed up, would have prevented the mistake.<sup>46</sup> Thus, knowledge on the part of the vendee of land that a third person is in possession of the land purchased is sufficient to lead the vendee to a knowledge of the nature of the title and claim of such third person, and equity will deem that he has such knowledge.<sup>47</sup> And a purchaser of land subject to an incumbrance, having notice of the existence of the incumbrance and of its general nature, is chargeable with knowledge of the contents, terms, and conditions thereof, and cannot avoid his purchase, no deceit having been practised, because he did not acquaint himself with the particulars.<sup>48</sup> Further, it is said that the rule that

<sup>44</sup> *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454.

<sup>45</sup> *Advertiser & Tribune Co. v. Detroit*, 43 Mich. 116, 5 N. W. 72. And see *Wayne County v. Randall*, 43 Mich. 137, 5 N. W. 75; *McArthur v. Luce*, 43 Mich. 435, 5 N. W. 451, 38 Am. Rep. 204.

<sup>46</sup> *Lovington v. Short*, 77 Ill. 587; *Schimmelpfenning v. Brunk*, 153 Iowa, 177, 132 N. W. 838. But see *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764.

<sup>47</sup> *McRae v. McMinn*, 17 Fla. 876.

<sup>48</sup> *Feltenstein v. Ernst*, 49 Misc. Rep. 262, 97 N. Y. Supp. 376.

contracting parties must exercise ordinary prudence in conducting negotiations and executing instruments is not confined to cases where the rights of third persons have intervened, but prevails where the controversy is between the immediate parties.<sup>49</sup> And the rule applies with special force where the complaining party had previously admitted that he had carefully examined the written contract and found it correct in all particulars.<sup>50</sup>

But in view of the necessary limitations of human intelligence, and of the fact that the most prudent and careful of men do at times make mistakes, some courts have thought that the rule above set forth was inequitably severe. Thus, the Supreme Court of Wisconsin has said: "Ignorance of facts must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed, that if a party might, by the exercise of reasonable diligence, have ascertained the facts, he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The later cases establish the doctrine that, whenever there is a clear, bona fide mistake, ignorance, or forgetfulness of facts, the contract may on that account be avoided."<sup>51</sup> And the court in Florida declares that a mistake of fact in the execution of a deed is ground for cancellation, though unilateral and negligent, where the negligence is not a breach of legal duty, and the mistake is material and made under circumstances rendering it inequitable for the grantee to have the benefit thereof, though the parties were dealing at arms' length and on an equal footing and the grantee did not contribute to the mistake.<sup>52</sup> And of course the rule is to be relaxed, or altogether set aside, where, although one party was careless or negligent, the other practised fraud or misrepresentations upon him,<sup>53</sup> or took ad-

<sup>49</sup> Robinson v. Glass, 94 Ind. 211.

<sup>50</sup> Shrimpton Mfg. Co. v. Brin, 59 Tex. Civ. App. 352, 125 S. W. 942.

<sup>51</sup> Hurd v. Hall, 12 Wis. 112.

<sup>52</sup> Crosby v. Andrews, 61 Fla. 554, 55 South. 57, Ann. Cas. 1913A, 420.

<sup>53</sup> Story v. Gammell, 68 Neb. 709, 94 N. W. 982; Beland v. Anheuser-Busch Brewing Ass'n, 157 Mo. 593, 58 S. W. 1.

vantage of his confidential relationship to him,<sup>54</sup> or of his advanced age, weakness, or inexperience.<sup>55</sup>

§ 132. **Mistake of Both Parties.**—Where both the parties to a contract or conveyance have the same belief or understanding in regard to a material matter of fact affecting it, but both are mistaken in such belief or understanding, it is a case of “mutual” or “common” mistake; and where such a mutual mistake exists, no fraud being imputable to either party, it is good ground in equity for rescinding the agreement, even after it has been fully executed by both parties.<sup>56</sup> Thus, if both the parties to a conveyance or a written contract suppose at the time of its execution that it fully expresses the agreement which they actually intended to make, but it is afterwards discovered that an important and material provision has been omitted, or, if inserted, expresses a different provision than that contemplated by the parties, there is a mutual mistake giving ground for rescission.<sup>57</sup> So, where a valuable piece of personal property is placed in a storage warehouse, the warehouseman agreeing to return it on demand or else to pay the fixed value thereof, and it cannot be found when called for, and the warehouseman, believing it to have been stolen, gives a check in payment for it, but finds it the day after the check

<sup>54</sup> *Wood v. Wack*, 31 Ind. App. 252, 67 N. E. 562.

<sup>55</sup> *Hutchinson v. Bambas*, 249 Ill. 624, 94 N. E. 987.

<sup>56</sup> *Kansas City & M. Ry. Co. v. Smithson*, 113 Ark. 305, 168 S. W. 555; *Durflinger v. Baker*, 149 Ind. 375, 49 N. E. 276; *Bryan v. Masterson*, 4 J. J. Marsh. (Ky.) 225; *Wheaton Building & Lumber Co. v. City of Boston*, 204 Mass. 218, 90 N. E. 598; *Harrison v. Stowers*, 1 Miss. (Walk.) 165; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Knapp v. Fowler*, 30 Hun (N. Y.) 512; *L. D. Garrett Co. v. Halsey*, 38 Misc. Rep. 438, 77 N. Y. Supp. 989; *Marmet Co. v. City of Cincinnati*, 32 Ohio Cir. Ct. R. 555; *Boehm v. Yanquell*, 15 Ohio Cir. Ct. R. 454; *Kinney v. Eckenberger*, 74 Or. 442, 145 Pac. 665; *Glassell v. Thomas*, 3 Leigh (Va.) 113; *Crislip v. Cain*, 19 W. Va. 438; *Jenkins v. Bradley*, 104 Wis. 540, 80 N. W. 1025.

<sup>57</sup> *Home Sav. Ass'n v. Noblesville Monthly Meeting of Friends Church* (Ind. App.) 64 N. E. 478; *Beach v. Bellwood*, 104 Va. 170, 51 S. E. 184. But see *Root v. Snyder*, 161 Mich. 200, 126 N. W. 206, holding that if deeds delivered by a grantor are not effective to carry out an oral agreement between the parties, which they supposed they were making effective, the deeds should be corrected, instead of being declared void.

is given, the settlement will be deemed to have been made under a mutual mistake of fact, and payment of the check may be stopped by the warehouseman.<sup>58</sup> So a court of equity will grant relief against a mortgage executed to secure a debt for which the mortgagor's ancestor had been bound as surety, where both parties acted under the mistaken belief that the property was already under a lien for the debt, whereas in fact the debt was barred by limitation.<sup>59</sup> So again, in an instructive case in the federal courts, complainant entered into a contract with the receiver for a railroad company, through the manager, to supply coal for the use of the company at stated prices for one year, with the option to the complainant to renew the contract for two years more. Within a few months, the railroad was sold to defendant, which continued its operation under the same manager without visible change, and during the remainder of the year complainant continued to deliver coal, which was received and settled for by defendant at the contract price, although coal had largely increased in price in consequence of widespread strikes. Herein both the parties acted under a mutual mistake of fact in supposing that such deliveries were made under the contract. At the end of the year, complainant elected to extend the contract for two years, but defendant refused. It was held that complainant was entitled to relief in equity on the ground of mistake, to have the settlements set aside, and to recover the difference between the contract price and the market price of the coal so delivered and received.<sup>60</sup>

**§ 133. Mutual Ignorance of Material Facts.**—Where both the parties to a contract entered into it in ignorance of a material fact, which would have prevented the making of the contract if the fact had been known, it is a case of mutual mistake justifying rescission.<sup>61</sup> Thus, for instance, a

<sup>58</sup> *State Sav. Bank v. Buhl*, 129 Mich. 193, 88 N. W. 471, 56 L. R. A. 944.

<sup>59</sup> *Blakemore v. Blakemore*, 19 Ky. Law Rep. 1619, 44 S. W. 96.

<sup>60</sup> *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.* (C. C.) 162 Fed. 542.

<sup>61</sup> See the cases cited, *infra*, in this section. But note that in some states this rule is rejected by statute, as in Georgia, where it is pro-



contract of sale made by an agent after the revocation of his authority by the death of his principal will be rescinded in equity at the instance of the purchaser, when both parties acted in ignorance of the principal's death.<sup>62</sup> So where a remainderman arranged for the sale of his estate in remainder, but both he and the purchaser were then ignorant of the fact that the life tenant was already dead, it was held that there was a mutual mistake of fact as to the subject-matter of the sale, which was sufficient to avoid the contract, in the absence of negligence or subsequent acquiescence.<sup>63</sup> And a similar rule was applied in a case where plaintiff and defendant made a trade of their lands and exchanged deeds therefor, but on the night prior to the exchange of deeds a house on defendant's land was destroyed by fire, which fact was then unknown to both parties,<sup>64</sup> and in a case where the owner of a claim against a foreign government gave to another a power of attorney for its collection, including an agreement for a large contingent fee, but neither of the parties knew that, shortly before, the claim had been allowed and liquidated by a treaty,<sup>65</sup> and in a case where a party took a lease of a vacant lot, with the intention of erecting a wooden building thereon, but the lot was within the district where the erection of wooden buildings was forbidden by law, which fact was unknown to both the parties.<sup>66</sup> So, there may be a rescission where a

vided that "ignorance by both parties of a fact does not justify the interference of a court," and "mistake of a material fact may in some cases justify the rescission of the contract; mere ignorance of a fact will not." Civ. Code Ga. 1910, §§ 4582, 4115. And see *Crowder v. Langdon*, 38 N. C. 476. But compare *Tarbox v. Tarbox*, 111 Me. 374, 89 Atl. 194.

<sup>62</sup> *Seruggs v. Driver*, 31 Ala. 274.

<sup>63</sup> *Moehlenpah v. Maybaw*, 138 Wis. 561, 119 N. W. 826, citing *Scott v. Coulson*, L. R. 1 Ch. Div. 453 (sale of a life insurance policy, both parties believing the assured to be alive, when he was already dead); *Cochrane v. Willis*, L. R. 1 Ch. App. Cas. 58 (sale by a tenant in tail, on the assumption that the life tenant was alive, when he was not); *Colyer v. Clay*, 7 Beav. 188 (sale of an expectancy in the belief that the holder for life was still living, which was contrary to the fact).

<sup>64</sup> *Beardsley v. Olem*, 137 Cal. 328, 70 Pac. 175.

<sup>65</sup> *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633.

<sup>66</sup> *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094.



purchaser took a deed of land from executors, with a covenant only against their own acts, neither party knowing, but afterwards discovering, that there was a long lease on part of the premises conveyed.<sup>67</sup> Again, where several underwriters in a policy of insurance agreed that all the suits against them severally for a loss should abide and follow the event of one, the agreement was set aside upon proof of a difference in the several cases unknown to the defendants at the time of the agreement.<sup>68</sup> And where two parties enter into a contract to perform specific work, neither having knowledge of the facts actually existing, and the contract proves to involve work essentially different from that which the parties had in mind, it will not be enforced.<sup>69</sup>

§ 134. **Materiality of Mistake.**—To induce a court of equity to decree the rescission of a contract or the cancellation of a conveyance on the ground of mistake, it must be shown that the mistake was material.<sup>70</sup> And in order to fulfill this requirement, it must appear that the mistake affected the substance of the transaction and not merely some collateral or incidental matter, and that it was in itself of such importance as to have controlled and determined the conduct of the mistaken party, so that he would not have entered into the contract at all, if it had not been for the mistake.<sup>71</sup> “A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and

<sup>67</sup> *Sandford v. Travers*, 20 N. Y. Super. Ct. 498.

<sup>68</sup> *Alexander v. Muirhead*, 2 Desaus. (S. C.) 162.

<sup>69</sup> *The Stanley H. Miner* (D. C.) 172 Fed. 486.

<sup>70</sup> *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Callender v. Colegrove*, 17 Conn. 1; *Beaver v. Trittip*, 24 Ind. 41; *Robinson v. Bobb*, 139 Mo. 346, 40 S. W. 938; *Lamoreaux v. Phelan*, 89 Neb. 47, 130 N. W. 988; *Taylor v. Fleet*, 4 Barb. (N. Y.) 95; *Marshall v. Homler*, 13 Okl. 264, 74 Pac. 368; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; *Camp v. Smith* (Tex. Civ. App.) 166 S. W. 22.

<sup>71</sup> *Murray v. Paquin* (C. C.) 173 Fed. 319; *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430; *Wood v. Evans*, 43 Mo. App. 230; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441; *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856; *Kowalke v. Milwaukee Electric Railway & Light Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877. And see *Lasbury v. Scarpulla* (Sup.) 156 N. Y. Supp. 744.

not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.”<sup>72</sup> In an English case, it is said that there is a difference in this respect between fraudulent representations inducing a contract and mistake, and that to justify rescission on the former ground it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract, but to warrant a rescission on the ground of mistake, it must be shown that there was an entire difference in substance between the supposed and the real object of the contract, so as to constitute a failure of consideration.<sup>73</sup>

To illustrate, where a person took a lease of a vacant lot for a term of five years at a substantial rent, for the purpose and with the intention of erecting a wooden building thereon for use in his business, and it was afterwards discovered that the lot was within a district where the erection of wooden buildings was forbidden by law, which neither of the parties knew at the time, it was held that the lessee was entitled to rescission, since the lease was of no substantial value to him if he could not use the lot as he had intended.<sup>74</sup> But a party may also rescind a contract on account of a mistake which would not ordinarily be considered material, in the technical sense, if it really is important to him in his particular situation, and if he calls attention to this fact before signing the contract. This rule was applied in a case where one chartered a vessel, and both he and the owner supposed that she was to sail on a given date from the foreign port where she then lay, and she did not sail until eighteen days later.<sup>75</sup> But on the other hand, a mistake, however material originally, is no ground for rescinding where it is corrected and set right before anything is done in the execution of the contract.<sup>76</sup> Thus, whether the ven-

<sup>72</sup> *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798.

<sup>73</sup> *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580.

<sup>74</sup> *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094.

<sup>75</sup> *Funch v. Abenheim*, 20 Hun (N. Y.) 1.

<sup>76</sup> *John Single Paper Co. v. Hammermill Paper Co.*, 96 App. Div. 535, 89 N. Y. Supp. 116.

dor in a deed shared in a mistake as to the person to whom the deed should have been made is immaterial, after a conveyance has been made by the vendee to correct the alleged mistake.<sup>77</sup> And so, the purchaser of a lot may not rescind the sale because, in the description of the premises in the deed, the names of abutting streets were erroneously interchanged, the obvious error being corrected by a particular description.<sup>78</sup>

§ 135. **Mistakes of Agents.**—Whether a principal can obtain rescission of a contract made for him by his agent, on account of the blunder or mistake of the agent, is not entirely clear upon the authorities. But, assuming that no question is involved as to the authority of the agent to bind his principal in the particular transaction, the rule appears to be much the same as in the case of a contract made by the principal himself. The contract may be rescinded if the opposite party knew of the agent's mistake and inequitably seeks to take advantage of it,<sup>79</sup> or if the mistake of the agent was induced by the fraud, false representations, or mismanagement of the other party,<sup>80</sup> or if it was a case of mutual mistake as between the agent and the other contracting party,<sup>81</sup> or perhaps in cases where all these elements are lacking, and yet the contract can be rescinded without material loss or injury to any one else.<sup>82</sup> But in a case where one obtained an order from defendant to supply marble for an agreed sum, and then obtained employment from marble dealers, and gave them the order, but incorrectly enumerating the articles to be supplied, it was held that the dealers were bound to fill the order as it was given by defendant, failing in which they could not recover the agreed sum.<sup>83</sup> In an English case, the plaintiff bought a bar of silver, and by agreement it was sent to an expert to

<sup>77</sup> *Jones v. Humphreys*, 39 Tex. Civ. App. 644, 88 S. W. 403.

<sup>78</sup> *Tepper v. Niemeler*, 32 Ky. Law Rep. 407, 105 S. W. 896.

<sup>79</sup> *Granniss v. Bates*, 55 Ga. 147.

<sup>80</sup> *Barnard v. Wheeler*, 24 Me. 412.

<sup>81</sup> *Renshaw v. Lefferman*, 51 Md. 277. See *Taber v. Piedmont Heights Bldg. Co.*, 25 Cal. App. 222, 143 Pac. 319.

<sup>82</sup> *Woolson v. Kelley*, 73 Minn. 513, 76 N. W. 258.

<sup>83</sup> *Shipway v. Rofrano*, 28 Misc. Rep. 230, 58 N. Y. Supp. 1111.

be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver in the bar was much less than was stated in the report. It was held to be a case of mutual mistake, and that the plaintiff, on offer to return the bar, could maintain assumpsit for the price paid. Lord Ellenborough said that it was a case where neither party was to rely on his own knowledge or judgment, but the intervention of some other standard was made necessary by the nature of the commodity, and as to the assayer, he was the agent of both parties, so that his mistake was equivalent to their mutual mistake.<sup>84</sup>

§ 136. **Mistake in Transmission of Telegram.**—According to the rule generally recognized in the United States, one who sends an offer or acceptance of a business proposition by telegram makes the telegraph company his agent for the purpose, assumes the risk of errors in transmission, and is bound by the terms of the message as it is delivered to the addressee, though it may be materially different from the message as filed for sending.<sup>85</sup> Hence if, for example, a mistake is made in the transmission of the telegram, in regard to price, quantity, or terms of sale, but the addressee, being unaware of this, unconditionally accepts the proposition as delivered to him, the sender is bound to fulfill the contract on that basis, and cannot rescind or repudiate it on account of the mistake of the telegraph company.<sup>86</sup> A contrary rule prevails in England and in some of the states.<sup>87</sup> Thus, in a case in Kentucky, where a telegraph company negligently delivered a different message from

<sup>84</sup> *Cox v. Prentice*, 3 Maule & S. 344.

<sup>85</sup> *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; *Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

<sup>86</sup> *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Haubelt Bros. v. Rea & Page Mill Co.*, 77 Mo. App. 672; *Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. R. 516.

<sup>87</sup> *Henkel v. Pape*, L. R. 6 Ex. 7; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699

that which it was authorized to deliver, so that the sender was represented as offering goods for sale at a lower price than that at which he had in fact offered them, and the supposed offer was accepted in ignorance of the mistake, it was held that there was no contract, and the sender was not bound to deliver the goods at the lower price.<sup>88</sup> And in a case in New York, it appeared that a buyer of imported artificial silk sent a cipher cablegram calling for a reduction of two marks per kilo as a condition to shipments, but by reason of mistransmission the code words as to such reduction were unintelligible. The seller notified the buyer that it would make shipments, pursuant to which the buyer sold 2,000 kilos on the basis of the reduced price before the mistake was discovered. It was held that the seller was only entitled to recover for the amount so sold at the reduced price, though the buyer was not entitled to that price as to the balance sold after discovery of the error and the seller's refusal to furnish the goods at the reduction.<sup>89</sup>

But it is a general principle, as stated in an earlier section,<sup>90</sup> that a contract may be rescinded for mistake, though the mistake was unilateral, if the other party was aware of it and seeks to take an unconscientious advantage of it. Hence it would appear to make a case for equitable relief where the mistake in the transmission of a telegraphic message was so gross and palpable on the face of it that the recipient must have been aware that a mistake had been made, and could not rationally suppose the message as received to be the same with the message delivered for sending. In a case in Missouri, a broker, on receipt of a telegram from his principal, quoting very low prices for flour, made a large sale of flour to a merchant. But the latter, before concluding the bargain, asked if there was not some mistake. The agent showed him the telegram, and also told him of other sales which his principal had made at low prices. It was held that the purchase was made in

<sup>88</sup> *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119. And see *Western Union Tel. Co. v. Anniston Cordage Co.*, 6 Ala. App. 351, 59 South. 757.

<sup>89</sup> *Schuller v. Robison*, 139 App. Div. 97, 123 N. Y. Supp. 881.

<sup>90</sup> *Supra*, § 130.

good faith by the merchant, and that the contract could not be rescinded by the seller.<sup>91</sup> It should also be observed that where the price named in a telegram, as delivered to the addressee, is lower than that written in the message as delivered to the telegraph company, and the offer is accepted on the basis of the lower price, but before anything is done towards fulfilling the contract, a letter is sent and received in which the original and intended price is reiterated, there is no completed contract, and the seller cannot be held liable for refusal to fill the contract at the lower price.<sup>92</sup>

**§ 137. Mistakes of Draftsmen.**—It is a well-settled principle that equity may correct or reform an instrument which fails to express the true purpose and intention of the parties in consequence of mistakes made by the draftsman, whether through negligence, inadvertence, or lack of familiarity with technical terms. But cases are much more rare in which application to equity for the rescission or cancellation of instruments is made on this ground. However, there are authorities to the effect that where an instrument is executed which professes to carry into execution an agreement previously entered into, but which by mistake of the draftsman, either as to fact or law, does not accomplish the intended purpose, equity will relieve from such mistake.<sup>93</sup> On application to reform a deed by correcting a mistake made by the draftsman, "it is no answer to say that the scrivener used the words which he intended to use. It is the mistake of the parties to the deed which we are to inquire into, and if they are misled by a misplaced confidence in the skill of the scrivener, it can hardly be said to be a mistake of law and not of fact on their part. But we are of the opinion that courts of equity in such cases are

<sup>91</sup> *Keller v. Meyer*, 74 Mo. App. 318.

<sup>92</sup> *Postal Tel. Cable Co. v. Akron Cereal Co.*, 23 Ohio Cir. Ct. R. 516.

<sup>93</sup> *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174, 5 L. Ed. 589; *Taylor v. Godfrey*, 62 W. Va. 677, 59 S. E. 631; *Murray v. Sanderson*, 62 Wash. 477, 114 Pac. 424; *Chapman v. Allen, Kirby* (Conn.) 399, 1 Am. Dec. 24. "A mistake of law in the draftsman, or other agent, by which the contract, as executed, does not fulfill or violates the manifest intention of the parties to the agreement, is relievable in equity." Civ. Code Ga. 1910, § 4577.

not limited to affording relief only in cases of mistake of fact, and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against on proper proof.”<sup>94</sup> So also, relief may be had where the mistake consists in the omission of something material to the contract, or in the substitution of one non-technical word for another. Thus, where a married woman purchases realty and gives a purchase-money mortgage back, in which her husband does not join, the omission to include him being due to a mistake on the part of the draftsman, the mortgagee is entitled to a cancellation of his deed to the mortgagor, if the other necessary elements exist.<sup>95</sup> So a case is made out by a pleading which shows that certain timber was bought, and that, by mutual mistake of the parties and of the scrivener, only a part of the timber was specified in the agreement.<sup>96</sup> In a case in Pennsylvania, application was made for the cancellation of a policy of fire insurance, on the ground that it was issued for three years, but by mistake “five years” was written in the policy, and that, after the expiration of three years but within five years, the property was burned, and the assured had begun an action at law on the policy. But the evidence on the question of mistake being conflicting, it was held that the bill should be dismissed without prejudice.<sup>97</sup>

**§ 138. Mistake as to Identity of Party.**—Mistake as to the identity of the party with whom a contract is made will be ground for rescinding or repudiating it, if its enforcement would result in loss or injury to the person making the mistake, but not otherwise. Thus, it is no ground for setting aside a sale that the grantor conveyed to a trustee when he supposed he was conveying to the cestui que trust,<sup>98</sup> and the fact that one contracting with a corporation

<sup>94</sup> *Canedy v. Marcy*, 13 Gray (Mass.) 373.

<sup>95</sup> *Dietrich v. Hutchinson*, 73 Vt. 134, 50 Atl. 810, 87 Am. St. Rep. 698.

<sup>96</sup> *Doell v. Schrier*, 36 Ind. App. 253, 75 N. E. 600.

<sup>97</sup> *Appeal of Edmonds*, 59 Pa. 220.

<sup>98</sup> *Whitesides v. Taylor*, 105 Ill. 496. But see *School Sisters of Notre Dame v. Kusnitt*, 125 Md. 323, 93 Atl. 928, holding that one's right to avoid a contract on account of mistake as to the identity of



thought he was dealing with a partnership will not prevent the company from recovering on the contract, where there was no actual misrepresentation, and the work has been fully performed.<sup>99</sup> Again, in the absence of fraud, mistake of a vendor of a lot as to the race of the purchaser, the latter being a negro, is no ground for rescission, that circumstance not being of the essence of the contract.<sup>100</sup> But where questions of credit or solvency are concerned, the matter wears a different aspect. For instance, where the seller of goods supposes, from the name in which they are ordered, that the purchaser is a corporation, and makes inquiries as to the amount of its capital stock and the names of its officers and directors, and then learns for the first time that the purchaser is not a corporation but an individual trading under a corporate name, he is justified in declining to extend credit or ship the goods.<sup>101</sup> So, in a case in North Carolina, the action was brought to recover goods shipped to "A. Alexander." It appeared that there was a person in the neighborhood whose real name was Arthur B. Alexander, and another whose name was Alfred Alexander, and though the goods were ordered by Arthur Alexander, who was notoriously insolvent, the seller shipped them under the mistaken belief that they had been ordered by Alfred Alexander, who was a man of means, and intended to ship them to him and not to Arthur Alexander. It was held that no title passed to the last named on receiving the goods.<sup>102</sup> There may also be other cases in which the identity of the contracting party will be vitally important, and where any mistake in this particular will prevent the formation of a valid contract, as, for instance, in the contract of marriage,<sup>103</sup> and in cases of employment where the

the other contracting party does not depend on whether it was important to know such party, or that he had reason for wanting to contract with him.

<sup>99</sup> *John Weber & Co. v. Hearn*, 49 App. Div. 213, 63 N. Y. Supp. 41.

<sup>100</sup> *Cole v. Hunter Tract Improvement Co.*, 61 Wash. 365, 112 Pac. 368, 32 L. R. A. (N. S.) 125, Ann. Cas. 1912C, 749.

<sup>101</sup> *Fifer v. Clearfield & Cambria Coal & Coke Co.*, 103 Md. 1, 62 Atl. 1122. And see *Consumers' Ice Co. v. E. Webster, Son & Co.*, 32 App. Div. 592, 53 N. Y. Supp. 56.

<sup>102</sup> *Newberry v. Norfolk & S. R. Co.*, 133 N. C. 45, 45 S. E. 356.

<sup>103</sup> See 1 Whart. Contr. § 180; 1 Bishop, Mar. & Div. § 204.

special skill, knowledge, aptitude, or personality of the person employed is the very thing contracted for and expected to be availed of, so that no substitution could be satisfactory to the employer.

§ 139. **Mistake as to Existence of Subject-Matter.**—A mutual mistake of the parties as to the existence of the subject-matter of their contract will invalidate it, except, perhaps, in cases where the uncertainty of the existence of the thing contracted for is the essence of the agreement.<sup>104</sup> For instance, where a sale or lease of supposed coal or ore lands for mining purposes was executed and received under the mutual belief that there was coal or ore underlying the land and that the same could be mined, and the evidence in an action to recover the rent or price of the land shows clearly that there was no coal or ore there, equity will grant relief because of the failure of consideration arising from the mutual mistake.<sup>105</sup> So where, at the time defendant agreed to furnish sufficient rock from a certain quarry to ballast plaintiff's railroad track, both parties erroneously believed and assumed that there was sufficient rock in the quarry to complete the work, there was a mutual mistake of fact, such as to make the contract unenforceable.<sup>106</sup> Again, a contract will not be enforced when it appears to have been based on the supposed existence of a certain fact which furnished the motive for entering into the agreement, if it subsequently transpires that the assumption on which the contract was based was erroneous. Thus, the government advertised for proposals for carrying the mails between Galveston and Velasco, in Texas, and one Charles, having made a bid which was accepted, entered into a con-

<sup>104</sup> *Darnell v. Dolan* (Tex. Civ. App.) 132 S. W. 857; *Paul v. Chenault* (Tex. Civ. App.) 44 S. W. 682; *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600; *Cook v. Smith*, 184 Mo. App. 561, 170 S. W. 672.

<sup>105</sup> *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61; *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Muhlenberg v. Henning*, 116 Pa. 138, 9 Atl. 144.

<sup>106</sup> *St. Louis Southwestern Ry. Co. v. Johnston*, 58 Tex. Civ. App. 639, 125 S. W. 61. And see *Edwards v. Trinity & B. V. Ry. Co.*, 54 Tex. Civ. App. 334, 118 S. W. 572.

tract with the government for carrying the mails between those places. After he had entered upon the performance of his contract he discovered that, some time before the advertisement for bids, the post office at Velasco had been discontinued,—a fact which had been overlooked by the government when advertising for bids,—and that it was necessary to carry the mails destined for that place to Quintana, a place on the further side of a wide river which flowed between Velasco and Quintana, and which must be crossed by a ferry. A demand for additional compensation having been refused, Charles abandoned his contract, and it was held that he was entitled to do so, and incurred no liability thereby.<sup>107</sup>

A mistake of this kind must be mutual. But if one of the parties was ignorant of the fact that the subject-matter of the supposed contract did not exist, the other cannot be heard to say that he was aware of it and that there was therefore no mutual mistake, because this would convict him of setting a trap for the other party and taking advantage of his ignorance to lead him into a disadvantageous bargain. For instance, where a miller enters into a contract with a manufacturer of milling machinery for the construction of a mill which shall be capable of producing flour of a certain percentage and grade, and the contractor refuses to construct the mill, having discovered that the standard agreed on does not exist, on the ground that there is no means of deciding whether the mill, when completed, will conform to the contract, and because of the mutual mistake as to the standard, the miller cannot claim that he knew that the standard did not exist, and that it was the mistake of the contractor alone, without impeaching his own good faith.<sup>108</sup> In another case, a vendor of mining property represented to the purchaser that, in the opinion of an expert, there were 50,000 tons of mineral in place. The report of the expert showed on its face that the amount of mineral was but 5,000 tons. The vendor relied on the express misstatement of the results of the expert's ex-

<sup>107</sup> *United States v. Charles*, 74 Fed. 142, 20 C. C. A. 346.

<sup>108</sup> *Nordyke & Marmon Co. v. Kehlors*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.

amination and of the contents of his report. The purchaser relied on the mistake, and contracted to purchase the property. It was held to be a case of mutual mistake, and that equity would relieve the purchaser from his contract.<sup>109</sup>

§ 140. **Mistake as to Identity of Subject-Matter.**—Equity will grant relief, by way of rescission or cancellation, from a contract or conveyance based upon a substantial misunderstanding of the parties as to the subject-matter of the contract, though the mistake was entirely innocent on both sides and there was no fraud or misrepresentation.<sup>110</sup> This rule is very well illustrated by a case in Indiana, where a contract called for the delivery of "Indiana egg coal," and this term might properly have been used to describe either of two grades. The buyer had in mind the higher grade, and the seller the lower grade, and each party believed that he was contracting for the kind of coal which he had in mind, and it was held that no contract was made.<sup>111</sup> So, in a sale of real estate, if one party believes he is buying a particular piece of property, while the other thinks he is selling another piece, there is no meeting of minds so as to constitute a valid contract.<sup>112</sup> Thus, for instance, if the purchaser, desiring to inspect the property before completing the bargain, has a particular lot pointed out to him, which is satisfactory and which he supposes he is to acquire, but by accident or mistake he is shown the wrong lot, that is, a lot different from that which the vendor understands he is selling and which is described in the deed, it is a case in which equity may give relief on the ground of mutual mis-

<sup>109</sup> *Johnson v. Withers*, 9 Cal. App. 52, 98 Pac. 42.

<sup>110</sup> *Barfield v. Price*, 40 Cal. 535; *Eldorado Jewelry Co. v. Darnell*, 135 Iowa, 555, 113 N. W. 344, 124 Am. St. Rep. 309; *Relf v. McDonogh*, 19 La. 100; *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; *Allen v. Luckett*, 94 Miss. 868, 48 South. 186, 136 Am. St. Rep. 605; *Dunn v. Dunn*, 151 App. Div. 800, 136 N. Y. Supp. 282; *Leonhard v. Provident Sav. Life Assur. Soc.*, 130 Fed. 287, 64 C. C. A. 533.

<sup>111</sup> *Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 41 Ind. App. 658, 84 N. E. 776.

<sup>112</sup> *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296; *Bottomff v. Lewis*, 121 Iowa, 27, 95 N. W. 262; *Lee v. Laprade*, 106 Va. 594, 56 S. E. 719, 117 Am. St. Rep. 1021, 10 Ann. Cas. 303.

take.<sup>113</sup> The rule also finds its application in cases where the vendor and purchaser are agreed as to the property which is the subject of the sale, but by mutual mistake the land described in the written contract of sale or in the deed is not that intended to be conveyed.<sup>114</sup> And so where a vendor orally agrees to sell certain lots in a plan, but by mistake his clerk gives the vendee a receipt for the cash payment, which describes the property so as to include other lots not intended to be sold, and the vendee refuses to accept a deed in accordance with the real terms of the sale, the vendor may tender back the money paid and maintain an action to rescind.<sup>115</sup> But if a deed conveys the premises intended to be conveyed, it is valid, irrespective of misunderstandings as to the terms of description used, which are unimportant from this point of view.<sup>116</sup>

For similar reasons, where the seller intends to sell a certain car-load of merchandise, but by mistake, brought about by his giving an insufficient sampling order on the carrier, the purchaser samples another car and pays for the goods, on discovery of the mistake the purchaser may recover the payment.<sup>117</sup> So where a merchant advertises goods at a certain price, and the salesman by mistake sells goods of much greater value as part of the lot, the merchant, on discovering the mistake before delivery, may rescind the sale.<sup>118</sup> So where there is a mistake on the part of the seller of goods as to the quantity sold, and such mistake would work a manifest hardship on him, and give an undue advantage to the buyer, equity will not enforce the contract, as, for instance, where one supposes that he is buying

<sup>113</sup> *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; *Strong v. Lane*, 68 Minn. 94, 68 N. W. 765; *Selby v. Matson*, 137 Iowa, 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210. But see *Reeves v. McCracken*, 103 Tex. 416, 128 S. W. 895.

<sup>114</sup> *McMillan v. Morgan*, 90 Ark. 190, 118 S. W. 407; *Page v. Whatley*, 162 Ala. 473, 50 South. 116; *Selby v. Matson*, 137 Iowa, 97, 114 N. W. 609, 14 L. R. A. (N. S.) 1210; *Beason v. Coleman*, 92 Miss. 622, 46 South. 49; *Stahn v. Hall*, 10 Utah, 400, 37 Pac. 585; *Fearon Lumber & Veneer Co. v. Wilson*, 51 W. Va. 30, 41 S. E. 137; *Abbott v. Dow*, 133 Wis. 533, 113 N. W. 960.

<sup>115</sup> *Hovey v. Howard*, 177 Pa. 323, 35 Atl. 670.

<sup>116</sup> *Slater v. Reed*, 37 Or. 274, 60 Pac. 709.

<sup>117</sup> *De Wolff v. Howe*, 112 App. Div. 104, 98 N. Y. Supp. 262.

<sup>118</sup> *Goodrich v. Strawbridge*, 5 Pa. Co. Ct. R. 427.

five car loads of matches, and the other that he is selling one car load only, there is no sale.<sup>119</sup>

But in the absence of fraud, misrepresentation, or unconscionable conduct, a mistake as to the identity of the subject-matter must be mutual in order to afford ground for the intervention of equity.<sup>120</sup> Thus it is said: "If A. and B. contract for the sale of the cargo of the ship 'Peerless,' and there be two ships of that name, and A. means one ship and B. intends the other ship, there is no contract. But if there be but one ship 'Peerless,' and A. sells the cargo of that ship to B., the latter would not be permitted to excuse himself on the ground that he had in his mind the ship 'Peerness,' and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A.'s proposal were unmistakable, as if it were made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was thinking of a different vessel."<sup>121</sup> Further, as in all other cases of rescission on the ground of mistake, it is essential that the mistake should have been material. Thus, one who offers to do part of the work of construction on a building on a certain street, for a price named, cannot, after acceptance of his offer, allege that he was mistaken as to the particular lot on that street on which the building was to be located.<sup>122</sup> And again, to make a misunderstanding or mistake as to the identity of the subject-matter of the contract a ground for relief in equity, it must not have resulted from the negligence of the complaining party.<sup>123</sup>

<sup>119</sup> *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S. E. 755. But see *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826, holding that, where there is no doubt as to the subject-matter, the mere fact that one has in fact sold more than he thought, or the other got more than he expected, is not sufficient to avoid a contract of sale of land, although a mutual mistake as to the subject-matter will avoid the contract.

<sup>120</sup> *Wolff v. Megargel* (Sup.) 123 N. Y. Supp. 368.

<sup>121</sup> 1 *Benj. Sales* (6th Amer. Edn.) § 609, citing *Raffles v. Wichelhaus*, 2 Hurl. & C. 906.

<sup>122</sup> *McCormack v. Lynch*, 69 Mo. App. 524.

<sup>123</sup> *Dzuris v. Pierce*, 216 Mass. 132, 103 N. E. 296; *Columbian Conservatory of Music v. Dickenson*, 158 N. C. 207, 73 S. E. 990.

§ 141. **Mistake as to Price or Value of Subject-Matter.** Where there is a clear misunderstanding as to the price of an article alleged to have been sold, so that the minds of the parties never meet upon this point, there is no completed and enforceable contract, and the buyer cannot be held to have contracted to pay a reasonable price.<sup>124</sup> Thus, where plaintiff agreed to cut timber for defendant, and their written contract, by mistake, bound the defendant to pay \$10 per thousand feet, instead of \$1, as it should have been, and the defendant was aware of the mistake and intended to take advantage of it, but the plaintiff believed he was entitled to \$10, and entered upon the work and in good faith expended nearly the amount of the contract price in executing the contract, it was held that he might recover \$10 per thousand feet; but if plaintiff knew that the real price was \$1, he could not take advantage of the mistake in the written contract and claim more than that.<sup>125</sup>

But the value of the subject, as distinguished from the price, is a matter of opinion, and one upon which both parties are expected to exercise their independent judgment. And equity will not relieve against a contract made in good faith, where both parties are mistaken as to the value of the subject-matter. That is, relief will not be given simply because it proves a hard and losing bargain for the complaining party, where there was no fraud or misrepresentation, and both parties had the same belief, and made the same mistake, as to the value of the subject.<sup>126</sup> On this point, a leading text-writer says: "As a general rule in sales, the vendor and purchaser deal with each other at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting con-

<sup>124</sup> *Mummenhoff v. Randall*, 19 Ind. App. 44, 49 N. E. 40; *Estey Organ Co. v. A. & E. Lehman*, 132 Wis. 144, 111 N. W. 1097, 11 L. R. A. (N. S.) 254, 122 Am. St. Rep. 951.

<sup>125</sup> *Mercer v. Hickman-Ebbert Co.*, 32 Ky. Law Rep. 230, 105 S. W. 441.

<sup>126</sup> *Hunter v. Goudy*, 1 Ohio, 449; *Dortic v. Dugas*, 55 Ga. 484; *Citizens' Bank v. James*, 26 La. Ann. 264.



ditions or warranties. So that, even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful; neither party could avoid the contract made under the supposed error or mistake."<sup>127</sup> So where securities are sold at their par value, in ignorance of the fact that they command a premium in the market, the transaction will not be set aside on this ground, where it is not shown that the market value of the property was of the essence of the contract or its inducing cause.<sup>128</sup> There may, however, be some exceptions to this rule, as in the case of a sale of lands in a distant state, which, therefore, are not readily accessible to the inspection of the purchaser. It has been thought that he may rescind such a contract, on showing a mutual mistake as to the quality and value of the land.<sup>129</sup>

§ 142. **Errors in Computations or Estimates.**—When it is necessary for a person to make calculations or estimates, in order to determine the sum which he will bid for an offered contract, or to determine the cost to him of a proposed contract, or whether or not it will be advantageous to him to enter into it, he must assume the risk of any error or oversight in his computations, and cannot have relief in equity on the ground of mistake, if he reaches a wrong conclusion through inadvertence, misunderstanding of that which is plain on its face, or mathematical error.<sup>130</sup> Thus, the negligent omission by a bidder for public work to take

<sup>127</sup> 1 Benj. Sales (6th Amer. Edn.) § 610.

<sup>128</sup> *Sankey v. First Nat. Bank*, 78 Pa. 48.

<sup>129</sup> *McDonald v. Benge*, 138 Iowa, 591, 116 N. W. 602.

<sup>130</sup> *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 91 Fed. 28, 33 C. C. A. 319; *Tatum v. Coast Lumber Co.*, 16 Idaho, 471, 101 Pac. 957, 23 L. R. A. (N. S.) 1109; *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N. E. 564, 10 L. R. A. (N. S.) 114, 117 Am. St. Rep. 224; *James v. Dalbey*, 107 Iowa, 463, 78 N. W. 51; *Chaplaine Realty & Construction Co. v. Philip Gruner & Bros. Lumber Co.*, 137 Mo. App. 451, 118 S. W. 665; *Boeckler Lumber Co. v. Cherokee Realty Co.*, 135 Mo. App. 708, 116 S. W. 452; *Leonard v. Howard*, 67 Or. 203, 135 Pac. 549. But see *Lewis v. Chicago, S. F. & C. Ry. Co. (C. C.)* 49 Fed. 708.

into consideration certain features of the work in making the estimates on which his bid was based, does not constitute a mistake which will authorize a court of equity to release him from the contract created by the acceptance of such bid.<sup>181</sup> So, where plaintiff makes an offer to erect a building for a certain amount, and defendant accepts it, there is a consummated and binding agreement, although the plaintiff, in adding up the items of his estimates, makes a mistake of a very large sum, provided defendant is not in any way responsible for it.<sup>182</sup> And a contract by which a company agrees to construct waterworks and furnish a municipal corporation and its inhabitants with an adequate supply of water, all to be taken from springs on certain land, will not be canceled merely because the springs prove inadequate, the mistake as to their capacity having been no more the fault of the one party than of the other.<sup>183</sup> So a contractor who agrees to build a house for a specified sum is not justified in refusing to carry out his undertaking because of the error of a subcontractor in making his bid, which error induced the subcontractor to refuse to accept the work.<sup>184</sup> This rule is more specially applicable where the mistake is due to the heedlessness or indifference of the party making it. Thus, where one contracted to furnish for a lump sum all the sand necessary for the brick-work of a building, basing his estimate on the statement of the builder as to the number of brick to be used, and without looking at the plans, which the builder told him he could examine, it was held that there was no such fraud as would render the contract invalid, because a greater number of bricks were necessary than stated by the builder.<sup>185</sup> But good faith on the part of the opposite party is also required, and even if he did not cause the mistake, yet he cannot complain of a rescission of the contract if he knew of the mis-

<sup>181</sup> *Moffett, Hodgkins & Clarke Co. v. City of Rochester*, 91 Fed. 28, 33 C. C. A. 319.

<sup>182</sup> *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255.

<sup>183</sup> *Borough of Du Bois v. Du Bois City Waterworks Co.*, 176 Pa. 430, 35 Atl. 248, 34 L. R. A. 92, 53 Am. St. Rep. 678.

<sup>184</sup> *Bertram v. Bergquist*, 153 Ill. App. 43.

<sup>185</sup> *Williams v. Dalker*, 33 Misc. Rep. 70, 68 N. Y. Supp. 348.

take and sought to take an inequitable advantage of it.<sup>136</sup> And he may be charged with constructive knowledge of it. Thus, in one case, the owner for whom a building was to be erected, and who was himself an experienced contractor, was held put on inquiry as to whether the contractor in making his bid had not misunderstood the specifications, in view of the amount of the bid, and in view of the fact that another contractor had misinterpreted the specifications.<sup>137</sup> And further, relief may be granted as against a mistake of this kind, where the mistake was mutual, that is, made by both the parties in common.<sup>138</sup> It has also been said that equity will not relieve one from an agreement because he promises more than he is legally required to pay, in the absence of fraud.<sup>139</sup> But there is also a decision that an agreement of compromise and settlement may be rescinded by one of the parties thereto when he was under a mistake as to the amount due.<sup>140</sup>

§ 143. **Mistake as to Title.**—If both the parties to a sale of land believe that the vendor has a good title, whereas his title is defective on account of an outstanding title in a third person, the purchaser may rescind on the ground of a mutual mistake, and it is not necessary for him to show any fraud, deception, or concealment on the part of the vendor.<sup>141</sup> Thus, the purchaser may obtain rescission where the fact is discovered (which was unknown to both the parties at the time) that his grantor holds under a forged deed and therefore has no title.<sup>142</sup> So, in a case in Texas, the plaintiff, whose land was claimed adversely,

<sup>136</sup> *Supra*, § 130. And see *Tyra v. Cheney*, 129 Minn. 428, 152 N. W. 835.

<sup>137</sup> *Hudson Structural Steel Co. v. Smith & Rumery Co.*, 110 Me. 123, 85 Atl. 384, 43 L. R. A. (N. S.) 654.

<sup>138</sup> *Miller v. Sellwood*, 78 Minn. 190, 80 N. W. 960; *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654.

<sup>139</sup> *Williams v. Harvey, Cooke* (Tenn.) 466.

<sup>140</sup> *Melnecke v. Sweet*, 106 Wis. 21, 81 N. W. 986.

<sup>141</sup> *Strothers v. Leigh*, 151 Iowa, 214, 130 N. W. 1019; *Bowlin v. Pollock*, 7 T. B. Mon. (Ky.) 26; *Theriot v. Chaudoir*, 17 La. 445; *Iowa Loan & Trust Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22, 9 Ann. Cas. 255; *Ross v. Armstrong*, 25 Tex. Supp. 354, 78 Am. Dec. 574.

<sup>142</sup> *Horne v. Hughes*, 19 Cal. App. 6, 124 Pac. 736.

agreed to the appointment of persons to survey and settle the location of a line, under the belief that the controversy only involved the true location of that line, which was a common line between old surveys. The defendant claimed adversely under a patent to a narrow strip of land, which he supposed to be between the old surveys which called for each other, and the agreement between the parties to settle the line was made by the plaintiff in ignorance of the character of defendant's claim, and also in ignorance of the fact that the field notes of his own survey were not correct in his patent. It was held that the plaintiff was entitled to have the agreement canceled.<sup>143</sup> And in a case in New Jersey, where a bill sought to set aside a contract for the sale of lands on account of defendant's fraud, and there was no evidence of fraud, but it appeared that defendant had been mistaken as to the deeds conveying title to him, and he offered to supply the defects, it was held that he should be allowed a reasonable time to do so, and that, failing in that, the contract should be set aside on the ground of mistake.<sup>144</sup> But it appears that where a grantor gives a warranty deed of land which he does not own, under the mistaken belief that he has title thereto, it will not be canceled at his instance, where no fraud, falsehood, misrepresentation, or concealment on the part of the grantee is alleged or shown.<sup>145</sup>

**§ 144. Mistake as to Quantity of Land Conveyed.—**Where a tract of land has been sold in gross for a specific price,—that is, not at a price of so much per acre or per square foot,—and it appears that there has been a material mistake as to the quantity, the land conveyed being substantially more or less than the quantity contracted for or named in the deed, the mistake being innocent and shared by both parties, a court of equity will give relief by rescinding the contract, provided there is no remedy at law adequate to the particular case.<sup>146</sup> But the excess or defi-

<sup>143</sup> *Morrill v. Bartlett*, 58 Tex. 644.

<sup>144</sup> *St. Francis Church v. Hargous*, 39 N. J. Eq. 339.

<sup>145</sup> *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303. But see *Vliet v. Cowenhoven*, 83 N. J. Eq. 234, 90 Atl. 681.

<sup>146</sup> *Van Loan v. Glaze*, 11 Cal. App. 750, 106 Pac. 250; *Rally v.*

ciency, as the case may be, must be substantial, and not inconsiderable, material, and not trifling. For the maxim "De minimis non curat lex" applies to a case of this kind, and equity will not be moved to interfere on account of a mistake so unimportant that it cannot be supposed to make any material difference to the parties concerned.<sup>147</sup> On the other hand, a case for rescission is made out if the mistake as to the quantity of land is so material that the agreement would not have been made if the truth had been known,<sup>148</sup> or if the deficiency is so great as to amount to a failure of consideration,<sup>149</sup> or so great as to suggest fraud on the part of the vendor.<sup>150</sup> Again, if it is shown that it is important for the object which the purchaser has in mind that he should have just the quantity of land which he believed he was to acquire, a deficiency in quantity, even though not very great, may be ground for rescinding the

Roberts, 33 Ky. Law Rep. 221, 109 S. W. 903; King v. Ballou, 24 Ky. Law Rep. 1946, 72 S. W. 771; Willey v. Fitzpatrick, 3 J. J. Marsh. (Ky.) 582; Keene v. Demelman, 172 Mass. 17, 51 N. E. 188; Allen v. Lockett, 94 Miss. 868, 48 South. 186, 136 Am. St. Rep. 605; Newton v. Tolles, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593; Belknap v. Sealey, 2 Duer (N. Y.) 570; Stern v. Benbow, 151 N. C. 460, 66 S. E. 445; McCrea v. Hinkson, 65 Or. 132, 131 Pac. 1025; Glover v. Smith, 1 Desaus. (S. C.) 433, 1 Am. Dec. 687; Bigham v. Madison, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267; Watkins v. Elliott, 28 Grat. (Va.) 374; Hall v. Graham, 112 Va. 560, 72 S. E. 105, Ann. Cas. 1913B, 1257; Wilson v. McConnell, 76 W. Va. 81, 77 S. E. 540; Western Min. & Mfg. Co. v. Peytona Cannel Coal Co., 8 W. Va. 406; Crislip v. Cain, 19 W. Va. 438. But compare Citizens' Bank of Louisiana v. Lenoir, 118 La. 720, 43 South. 385; Newman v. Kay, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 4 Ann. Cas. 39; Rogers v. Pattie, 96 Va. 498, 31 S. E. 897. In an early decision of the United States Supreme Court it was said that the rule that equity will relieve a purchaser of land in case of a deficiency in quantity applies only to contracts respecting lands in a settled country, where the titles are complete, the boundaries ascertained, and the real quantity either known or within the vendor's means of knowing. Dunlap v. Dunlap, 12 Wheat. 574, 6 L. Ed. 733. And see Clark v. Reeder, 158 U. S. 505, 15 Sup. Ct. 849, 39 L. Ed. 1070, as to cases where the sale is expressly made by the acre and not in gross. See also, as to similar cases, Dickinson v. Lee, 106 Mass. 557.

<sup>147</sup> Steinbach v. Hill, 25 Mich. 78; Davis v. Evans, 62 Ala. 401; Reynolds v. Vance, 4 Bibb (Ky.) 213.

<sup>148</sup> McCrea v. Hinkson, 65 Or. 132, 131 Pac. 1025.

<sup>149</sup> Ruffner v. Ridley, 81 Ky. 165.

<sup>150</sup> Martin v. Stone, 79 Mo. App. 309.

sale.<sup>151</sup> And this rule will apply also in cases where the vendor is unable to make title to a particular portion of the tract, and that portion includes the chief elements of value in the whole estate, such as the dwelling house, the spring, and the most valuable improvements.<sup>152</sup>

As to just what quantity of land may be regarded as "material," in this connection, no fixed rule can be established, but each case must be governed by its particular circumstances. And naturally, a difference must be made between agricultural or rural property on the one hand, and city building lots on the other. In a case in Kentucky, the fact that the purchaser of a tract of land supposed to contain 533 acres failed to get possession of  $7\frac{3}{4}$  acres was held not to entitle him to a rescission, although the land was thus left in such shape that it could not so conveniently be divided into smaller farms, as was intended by the purchaser, there being nothing to show that the vendor had any knowledge of the uses to which the purchaser meant to put the land.<sup>153</sup> And rescission was refused in another case where the tract of land sold was represented to contain 610 acres, but fell short of this amount by 67 acres, but the vendor was ordered to pay the average price per acre for the deficiency.<sup>154</sup> And in the same state it is said that a deficiency of 3 acres of land, not worth more than \$25, in the sale of a mill seat of 20 acres, is too small to authorize a rescission.<sup>155</sup> But a deficiency of one-sixth in the quantity of land, discovered upon a survey made soon after the sale, will justify cancellation at the suit of the purchaser.<sup>156</sup> As to city property, it is held in New York that where adjoining buildings encroach from 1 to  $3\frac{1}{2}$  inches on the property contracted to be sold, the vendee may reject the title.<sup>157</sup> And so, where a lot sold is represented as having a frontage of 27 feet 6 inches, and an accurate

<sup>151</sup> *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109.

<sup>152</sup> *Wells v. Porter*, 5 B. Mon. (Ky.) 416.

<sup>153</sup> *Burkholder v. Farmers' Bank of Kentucky*, 23 Ky. Law Rep. 2449, 67 S. W. 832.

<sup>154</sup> *McCoun v. Delany*, 3 Bibb (Ky.) 46, 6 Am. Dec. 635.

<sup>155</sup> *Ball v. Pursefull*, 3 Ky. Law Rep. 396.

<sup>156</sup> *Glover v. Smith*, 1 Desaus. (S. C.) 433, 1 Am. Dec. 687.

<sup>157</sup> *Klim v. Sachs*, 102 App. Div. 44, 92 N. Y. Supp. 107.

measurement shows that there is a deficiency of  $4\frac{1}{2}$  inches in the frontage, the vendee may refuse to complete the purchase and may recover the earnest money and expenses.<sup>158</sup> But in another case it was said that one who has contracted to purchase vacant lots with a frontage of 75 feet is not entitled to be discharged from his contract because of the failure of the vendor's title to 14 inches of frontage, to which no special value appears to attach, but is only entitled to an abatement in the price.<sup>159</sup>

Where, on a sale of land, the tract is described by metes and bounds, and is estimated to contain a specified quantity, "more or less," and a gross sum is to be paid for the entire tract (not so much per acre), the purchaser will not be entitled to rescind if the number of acres falls short of the estimated quantity.<sup>160</sup> For the addition of the words quoted makes the estimate of quantity a matter of description only, and not of the essence of the contract, and imports a waiver on the part of the purchaser of any warranty as to the precise number of acres. But any misrepresentation or concealment on the part of the vendor will take the case out of this rule.<sup>161</sup> And the rule has not always been applied in cases where the deficiency was very great. The theory is that a small difference in quantity may result from inconsiderable errors in surveying, from variations in the instruments used by surveyors, or from other like causes, and that the addition of the words "more or less" to an estimate of quantity is intended to guard against errors arising from such causes. But if the deficiency is too material to be attributed to such errors, the courts have sometimes held that it should be treated as a case of mutual mistake, not within the rule as to the words "more or less," and relief given accordingly. This doctrine was applied in a case in Virginia where the deficiency

<sup>158</sup> *Floeting v. Horowitz*, 120 App. Div. 492, 104 N. Y. Supp. 1037.

<sup>159</sup> *Kelly v. Brower*, 55 Hun, 606, 7 N. Y. Supp. 752.

<sup>160</sup> *Williams v. Smith Bros.*, 135 Ga. 335, 69 S. E. 480; *Pollock v. Wilson*, 3 Dana (Ky.) 25; *Tepper v. Niemeier*, 32 Ky. Law Rep. 407, 105 S. W. 896; *Jones v. Plater*, 2 Gill (Md.) 125, 41 Am. Dec. 408; *Willson v. Legro*, 75 N. H. 314, 74 Atl. 181; *Ketchum v. Stout*, 20 Ohio, 453.

<sup>161</sup> *Ketchum v. Stout*, 20 Ohio, 453.



amounted to 10 acres in a tract represented to contain 245 acres.<sup>162</sup> But on the other hand, in a case in Georgia, where the deed described the land conveyed as being "80 acres more or less," and there was an alleged shortage of 20 acres, it was held to be the province of the jury, and not of the court, to say whether this deficiency was so gross as to authorize a rescission of the contract.<sup>163</sup> But where land is sold for a lump sum, and is described in the deed by metes and bounds and as containing a certain quantity more or less, and it appears that the vendee was familiar with the tract and examined it with reference to the amount of timber and bark on it, to secure which was his main object in purchasing it, he is not entitled to have the sale rescinded because the tract actually contains only a little more than half the quantity mentioned in the deed, it appearing further that it did contain the estimated quantity of bark and timber, and that the vendee had cut that off before applying for relief.<sup>164</sup>

Equity will not rescind a transaction of this kind for this cause if there is an adequate remedy at law. Thus, in the case of a deficiency in the quantity of land conveyed, rescission will not be ordered if the vendor can and will supply the deficiency,<sup>165</sup> or if the purchaser can be made whole by an abatement or reduction in the purchase money to be paid,<sup>166</sup> or if in any other way adequate compensation can be made to him,<sup>167</sup> or if the rescission of the contract is impossible because the parties could no longer be restored to the status quo, but the purchaser may recover damages in a suit at law.<sup>168</sup> But a purchaser who discovers the fraudulent representations of the vendor as to quantity may not rely thereon as a defense to the vendor's suit to cancel the

<sup>162</sup> *McComb v. Gilkeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944.

<sup>163</sup> *Bryan v. Yates*, 7 Ga. App. 712, 67 S. E. 1048.

<sup>164</sup> *Coons v. Muhlenberg*, 148 Pa. 344, 23 Atl. 1115.

<sup>165</sup> *Myrtue v. White* (Iowa) 74 N. W. 926. But see *Yost v. Shaffer*, 3 Ind. 331, 56 Am. Dec. 509.

<sup>166</sup> *Kelly v. Brower*, 55 Hun, 606, 7 N. Y. Supp. 752; *Jennings v. Jennings*, 2 Abb. Prac. (N. Y.) 6.

<sup>167</sup> *Anderson v. Snyder*, 21 W. Va. 632; *Trammell v. Marks*, 44 Ga. 166; *Martin v. Peddy*, 120 Ga. 1079, 48 S. E. 420.

<sup>168</sup> *Rankin v. Atherton*, 3 Paige (N. Y.) 143.

contract for the purchaser's default, though such fraud would justify a rescission of the contract or an action for damages for breach of contract.<sup>169</sup> Where the mistake tells against the vendor, as, where he has conveyed a much greater quantity of land than he supposed or intended, a rescission of the transaction on equitable terms is the proper remedy, because, as said in an early case in Kentucky, the chancellor cannot set off to the vendee the number of acres which the tract was represented and supposed to contain.<sup>170</sup> But even in this case rescission will not be granted where the vendor has an adequate remedy by action at law to recover the price or value of the excess.<sup>171</sup>

§ 145. **Inadvertence.**—Inadvertence is a lack of heedfulness or attention. It consists essentially in the failure to notice or to remember some circumstance which would materially have affected the decision or action of the party if he had adverted to it. Though it results in his doing something which he would not otherwise have done, it is not the same as "mistake," as that term is used in equity jurisprudence, and is not ground for rescission of a contract, unless there was some fraud or unconscionable conduct on the other side.<sup>172</sup> Thus, in a case in South Carolina, an injured employé recovered judgment against his employer, who was protected by a policy of insurance covering such risks. In a creditor's suit against the insured employer, a consent order was entered directing payment of the policy to the insured. In an action on the policy, the answer admitted making the consent order, but alleged that it was done through mistake, the defendant having overlooked the fact of the insolvency of the insured, and the non-payment of the judgment against him, and defendant's escape from liability by reason thereof. But it was held that, even if defendant temporarily forgot these facts, and entered into the consent order, it was still bound by it, since momentary forgetfulness of a known fact is not relievable as a mis-

<sup>169</sup> *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064.

<sup>170</sup> *Daniel v. Pogue* (Ky. Dec.) 2 Ky. 98, 2 Am. Dec. 708.

<sup>171</sup> *Culton v. Asher*, 149 Ky. 659, 149 S. W. 946.

<sup>172</sup> *Rose v. Lewis*, 157 Ala. 521, 48 South. 105. But see *White v. Kincade*, 95 Kan. 466, 148 Pac. 607.

take.<sup>173</sup> So, in a case concerning a deed of trust by way of settlement made by a married woman, it was said: "It is clear that there was no mistake in the sense that she wrongly apprehended the contents of the deed. The most that can be said is that she did not, at the time she executed the deed, anticipate or have in her mind what would be its legal effect in the contingency of her husband's dying before her. She did not at the time think of this contingency, but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different."<sup>174</sup>

But still relief has sometimes been given in such cases, when a strong equity appeared to require it. In one case, the plaintiff conveyed to the defendant a lot of land on which there was a spring, from which the plaintiff, by means of an aqueduct, supplied his own and other premises with water. This aqueduct was of greater value to the plaintiff than the price for which he sold the land. He did not intend to convey the right to use the spring, nor did the defendant know of the existence of the spring at the time of his purchase, but by a mistake of the plaintiff, the deed to the defendant contained no reservation of such right. It was held on these facts that the plaintiff was entitled either to a reconveyance from the defendant of the right to use the water by means of the aqueduct, or, at the option of the defendant, to a reconveyance of the land on repayment to the defendant of the price paid.<sup>175</sup> In another case, a vendor agreed to convey land in consideration of the purchaser's agreement to support him. A lawyer was employed by the parties to draw the necessary papers, and he drew a deed conveying the land and a bond for support, making the purchaser and his wife promisors, and a mortgage by them to secure it. The vendor executed the deed, and the lawyer, forgetting that the purchaser's wife should sign the bond and mortgage, delivered the deed to

<sup>173</sup> *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477, 38 S. E. 160, 629.

<sup>174</sup> *Keyes v. Carleton*, 141 Mass. 45, 6 N. E. 524, 55 Am. Rep. 446.

<sup>175</sup> *Brown v. Lamphear*, 35 Vt. 252.

the purchaser, but, before the parties separated, the lawyer remembered the facts, and obtained possession of the deed, to be held by him until the purchaser's wife should have executed the bond and mortgage. It was held that the mistake in handing over the deed to the grantee before a material part of the transaction had been performed was a mistake of both parties, for the correction of which equity would give relief by cancellation of the deed.<sup>176</sup>

§ 146. **Mistaken Expectation as to Future Events.**—A mistaken belief or expectation as to the probable occurrence of a future event is not the kind of mistake which will entitle a party to relief in equity.<sup>177</sup> "It is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or opinion, or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and every one who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties."<sup>178</sup> Thus, the fact that a husband who conveyed property to his wife for her support after his death did so because he be-

<sup>176</sup> *Zoerb v. Paetz*, 137 Wis. 59, 117 N. W. 793.

<sup>177</sup> *Parke v. City of Boston*, 175 Mass. 464, 56 N. E. 718.

<sup>178</sup> *Chicago & N. W. Ry. Co. v. Wilcox*, 116 Fed. 913, 54 C. C. A 147.

lieved that he would die before her, in which belief he was mistaken, is not the kind of mistake for which a court will set aside the conveyance.<sup>179</sup> For the same reason a person who, without fraud or imposition, executes a release of his claim for damages for personal injuries received, cannot afterwards rescind or repudiate it upon discovering that the injuries actually sustained were much more severe, lasting, or numerous than he had supposed at the time of signing the release, or because his recovery is not so rapid as he had expected.<sup>180</sup> And a representation made by a claim agent or other representative of the person responsible for the injury, to the injured person, that the latter will recover within a short time specified, is merely an expression of opinion, and not a fraudulent representation such as to avoid a release of damages given under its influence.<sup>181</sup> The case is somewhat different with a physician employed by or representing the responsible party. If he gives any opinion at all, it is his duty to express his honest opinion, and the failure to do so is fraud. Thus where an injured person is induced to execute a release by the false and fraudulent representations of a physician sent to him by the defendant, to the effect that his injuries are but slight and temporary, and that he will soon make a complete recovery, the physician well knowing the contrary, the release will not be binding, especially where the injured person was at the time too weak and ill to form an intelligent judgment for himself.<sup>182</sup> But where an attending physi-

<sup>179</sup> *Bartley v. Knott*, 140 Ky. 288, 130 S. W. 1096.

<sup>180</sup> *Seeley v. Citizens' Traction Co.*, 179 Pa. 334, 36 Atl. 229; *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854; *Kowalke v. Milwaukee El. Ry. & Light Co.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877; *Kane v. Chester Traction Co.*, 186 Pa. 145, 40 Atl. 320, 65 Am. St. Rep. 846; *Dominels v. United States Casualty Co.*, 132 App. Div. 553, 116 N. Y. Supp. 975; *Tatman v. Philadelphia, B. & W. R. Co.* (Del. Ch.) 85 Atl. 716; *Borden v. Sandy River & R. L. R. Co.*, 110 Me. 327, 86 Atl. 242; *Owens v. Norwood White Coal Co.*, 157 Iowa, 389, 138 N. W. 483.

<sup>181</sup> *Douda v. Chicago, R. I. & P. R. Co.*, 141 Iowa, 82, 119 N. W. 272. But compare *Edmunds v. Southern Pacific Co.*, 18 Cal. App. 532, 123 Pac. 811.

<sup>182</sup> *Missouri Pac. Ry. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066; *Jones v. Gulf, C. & S. F. Ry. Co.*, 32 Tex. Civ. App. 198, 73 S. W. 1082; *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251,

cian, in the course of treatment, expresses a mistaken, but honest, opinion to the injured person as to the period within which he will recover, and such expression has no connection with the settlement of the claim for damages, a release executed in reliance on such opinion cannot be repudiated.<sup>183</sup>

But in a case in Pennsylvania, where a contract was made with reference to a situation of affairs which would result from the enactment of a bill then pending before the state legislature, both parties being sincere in their expectation that such bill would pass, and its expected passage being the material inducement to the making of the contract, but the bill failed of enactment, it was held that the contract might be set aside on the ground of a mistake of fact.<sup>184</sup>

§ 147. **Mistake in Matter of Law.**—It was long regarded as settled doctrine that equity could give no relief against a contract entered into under a mistake in matter of law, where there was no fraud or misrepresentation and no misunderstanding of the facts.<sup>185</sup> This rule was based upon

81 S. W. 1189; *Lumley v. Wabash R. Co.*, 76 Fed. 66, 22 C. C. A. 60; *St. Louis & S. F. R. Co. v. Richards*, 23 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032; *Nelson v. Chicago & N. W. R. Co.*, 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748. Contra, see *Gulf, C. & S. F. Ry. Co. v. Huyett*, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669.

<sup>183</sup> *Nelson v. Chicago & N. W. R. Co.*, 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748; *Atchison, T. & S. F. Ry. Co. v. Bennett*, 63 Kan. 781, 66 Pac. 1018.

<sup>184</sup> *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621.

<sup>185</sup> *Sims v. Lyle*, 4 Wash. C. C. 320, Fed. Cas. No. 12,892; *Stephenson v. Atlas Coal Co.*, 147 Ala. 432, 41 South. 301; *Burke & Williams v. Mackenzie*, 124 Ga. 248, 52 S. E. 653; *Carley v. Lewis*, 24 Ind. 23; *Hancock v. Wiggins*, 28 Ind. App. 449, 63 N. E. 242; *Kitchen v. Chantland*, 130 Iowa, 618, 105 N. W. 367, 8 Ann. Cas. 81; *Lyles v. Martin*, 5 La. 113; *Urquhart v. Gove*, 4 Rob. (La.) 207; *Jenks v. Mathews*, 31 Me. 318; *Prince de Bearn v. Winans*, 111 Md. 434, 74 Atl. 626; *McMurray v. St. Louis Oil Mfg. Co.*, 33 Mo. 377; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Fellows v. Heermans*, 4 Lans. (N. Y.) 230; *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 51; *Spear v. Gillet*, 16 N. C. 466; *Appeal of Pennsylvania Stave Co.*, 225 Pa. 178, 73 Atl. 1107, 133 Am. St. Rep. 875; *Norris v. Crowe*, 206 Pa. 438, 55 Atl. 1125, 98 Am. St. Rep. 783; *Hutton v. Edgerton*, 6 S. C. 485; *Lawrence v. Beaubien*, 2 Bailey (S. C.) 623, 23 Am. Dec. 155; *Brown v. Armistead*, 6 Rand. (Va.) 594; *Harner v. Price*, 17 W. Va. 523; *Pusey*

the theory that every one is presumed to be acquainted with the law, and that no one can be allowed to plead ignorance or mistake of the law as an excuse for his acts or as a ground for relief from a disadvantageous position. Such a case arises, for instance, where a contract is entered into under a mistake in the construction of a will,<sup>186</sup> or where the parties make their contract under a mistaken impression of the condition of the law applicable to the case, arising from their knowledge of a certain decision, but they are unaware of the fact that the decision had been subsequently overruled.<sup>187</sup> And generally, where parties knowing all the facts come to an erroneous conclusion as to their legal effect, such conclusion is a mistake of law.<sup>188</sup> This rule is still adhered to in all its severity in some of the states. But it has come to be regarded as a harsh rule, founded on an impossible assumption (that of universal knowledge of the law) and often resulting in great injustice. And there are many evidences of a desire on the part of the courts to escape from its binding force, or at least to exercise a discretion as to the instances in which it shall be applied. Thus, in several decisions the rule has been stated in the modified form that equity will relieve against a mistake of law only in exceptional cases and where it would be inequitable to refuse relief.<sup>189</sup> The Supreme Court of the United States has said: "While it is laid down that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts, yet the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of

v. Gardner, 21 W. Va. 469. And see, further, Schuman v. George, 110 Ark. 486, 161 S. W. 1039; Gardner v. Watson (Cal.) 150 Pac. 994; Coolin v. Anderson, 26 Idaho, 47, 140 Pac. 969; Campbell v. Newman (Okl.) 151 Pac. 602.

<sup>186</sup> *Wintermute v. Snyder*, 3 N. J. Eq. 489.

<sup>187</sup> *Kenyon v. Welty*, 20 Cal. 637, 81 Am. Dec. 137.

<sup>188</sup> *Stewart v. Ticonic Nat. Bank*, 104 Me. 578, 72 Atl. 741; *Palmer v. Cully* (Okl.) 153 Pac. 154; *Clark v. Lehigh & Wilkes-Barre Coal Co.*, 250 Pa. 304, 95 Atl. 462.

<sup>189</sup> *Errett v. Wheeler*, 109 Minn. 157, 123 N. W. 414, 26 L. R. A. (N. S.) 816; *Diebel v. Diebel*, 116 Minn. 168, 133 N. W. 463; *Texas & N. O. R. Co. v. Sabine Tram Co.* (Tex. Civ. App.) 121 S. W. 256. And see *Lawrence v. Beaubien*, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.



courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point, both English and American."<sup>190</sup> So also, various courts have observed that the rule against rescission on account of mistake of law should be relaxed where its enforcement would cause great injustice,<sup>191</sup> that equity will not allow one to enrich himself unjustly at the expense of another by reason of an innocent mistake, whether of fact or of law, entertained by the loser or by both,<sup>192</sup> and that a mistake of law may justify the rescission of a contract where it arises out of the doubtful construction of a grant, which is "very different from ignorance of a well-known rule of law."<sup>193</sup> In reason and common sense it appears absurd to hold people responsible for a knowledge of the law (or to refuse them relief against the consequences of a mistake) when the legal question involved is unsettled, doubtful, or contested. This was the view taken in a very early case in South Carolina, where personal property of a wife was, by a marriage settlement, settled upon her husband for life with remainder to her for life, and after the husband's death, the widow, supposing the settlement void under the recording act, purchased the settled property from the administrator, and her bonds, given for the price, were transferred to creditors of the husband. It being afterwards decided that such a settlement was valid,—a point which before was doubtful,—the court ordered the bonds of the wife to be given up and that she should hold the property discharged therefrom.<sup>194</sup> There appears also to be good ground for holding that a party may have relief in equity against a contract which is of a kind denounced by the law as illegal (such, for instance, as a contract in restraint of trade), where he entered

<sup>190</sup> *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678.

<sup>191</sup> *Reggio v. Warren*, 207 Mass. 525, 93 N. E. 805, 32 L. R. A. (N. S.) 340, 20 Ann. Cas. 1244; *Lawrence v. Beaublen*, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.

<sup>192</sup> *Bronson v. Leibold*, 87 Conn. 293, 87 Atl. 979.

<sup>193</sup> *Beauchamp v. Winn*, L. R. 6 H. L. 234.

<sup>194</sup> *Garner v. Garner*, 1 Desaus. (S. C.) 437.

into it in the genuine though mistaken belief that it was in no way contrary to law, and the other party seeks to hold him to it.<sup>195</sup>

Other courts take the view that equity can give no relief against the consequences of ignorance of the law, but may relieve against a mistake in matter of law.<sup>196</sup> At any rate, it is considered that the rule on the subject should be applied only in cases of unmixed mistake of law,<sup>197</sup> and that equity may accord relief where one has been surprised into doing what it is inequitable to hold him to, where fact and law are blended, or where the mistake of law is so combined with other things that it cannot reasonably be regarded as a deliberate blunder.<sup>198</sup> And in a case where two persons believed that they acquired real estate as heirs by adoption, when in fact they had not been adopted, and one of them sold his supposed interest to the other, it was held that their mistake was a mistake of fact as to the ownership of the property, and one which equity would correct.<sup>199</sup>

In several states, the rule under consideration has been abrogated or modified by statute. Thus, in some of the code states, it is enacted that "mistake of law constitutes a mistake within the meaning of this article [justifying the rescission of contracts] only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law, or (2) a misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify."<sup>200</sup> And in Maine, the court has pointed out that jurisdiction in equity in cases of "mistake" is expressly conferred by stat-

<sup>195</sup> *Chalmers Chemical Co. v. Chadeloid Chemical Co.* (C. C.) 175 Fed. 995.

<sup>196</sup> *Hopkins' Ex'rs v. Mazyck*, 1 Hill Eq. (S. C.) 242. Compare *Hart v. Roper*, 41 N. C. 349, 51 Am. Dec. 425.

<sup>197</sup> *King v. Doolittle*, 1 Head (Tenn.) 77.

<sup>198</sup> *Tabor v. Michigan Mut. Life Ins. Co.*, 44 Mich. 324, 6 N. W. 830.

<sup>199</sup> *Lewis v. Mote*, 140 Iowa, 698, 119 N. W. 152.

<sup>200</sup> Civ. Code Cal., § 1578; Rev. Civ. Code Mont., § 4984; Rev. Civ. Code N. Dak., § 5299; Rev. Civ. Code S. Dak., § 1207; Rev. Laws Okl. 1910, § 909.

ute in that state, and that the statute does not in terms limit it to mistakes of fact.<sup>201</sup>

§ 148. **Same; Mistake or Ignorance as to Party's Legal Rights.**—The doctrine has been advanced in some cases of considerable importance that when a person is fully acquainted with the facts, but enters into a contract, or makes a conveyance, in ignorance of his legal rights in the premises, or under a mistaken belief as to what his legal rights are, he can have no relief in the court of equity,<sup>202</sup> even where he acted upon the erroneous legal advice of his attorney.<sup>203</sup> Under this view, a promise to pay a supposed debt, though made under a mistake of law as to the party's liability, is binding and may be enforced.<sup>204</sup> And where a disputed claim, depending on a question of law, is settled by the parties, and a contract is made between them whereby one promises to pay money, he is bound thereby, although such question is really free from doubt, and, if properly resolved, would have released him from all liability.<sup>205</sup> So, where the drawer of a bill of exchange knows that time has been given to the acceptor without his (the drawer's) consent, but is ignorant of the fact that in law he is thereby discharged, and so promises to pay the bill, he is bound.<sup>206</sup> And the same rule has been applied to cases in which persons interested in decedents' estates have been mistaken or misinformed as to their rights or interests, and so have released or compromised them disadvantageously.<sup>207</sup>

<sup>201</sup> *Tarbox v. Tarbox*, 111 Me. 374, 89 Atl. 194; *Jordan v. Stevens*, 51 Me. 78, 81 Am. Dec. 556.

<sup>202</sup> *Dugas v. Town of Donaldsonville*, 33 La. Ann. 668; *John Soley & Sons v. Jones*, 208 Mass. 561, 95 N. E. 94; *Mackin v. Dwyer*, 205 Mass. 472, 91 N. E. 893; *Hughes v. Pealer*, 80 Mich. 540, 45 N. W. 589; *Kelly v. Connecticut Mut. Life Ins. Co.*, 27 App. Div. 336, 50 N. Y. Supp. 139; *Berks & Dauphin Turnpike Road v. American Telegraph & Telephone Co.*, 240 Pa. 228, 87 Atl. 580.

<sup>203</sup> *Treadwell v. Clark*, 124 App. Div. 260, 108 N. Y. Supp. 733. Compare *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58.

<sup>204</sup> *Bond v. Coats*, 16 Ind. 202; *Finks v. Hollis*, 38 Tex. Civ. App. 23, 85 S. W. 463.

<sup>205</sup> *City Electric Ry. Co. v. Floyd County*, 115 Ga. 655, 42 S. E. 45. And see *Percy v. Hollister*, 66 Ill. App. 594.

<sup>206</sup> *Stevens v. Lynch*, 12 East, 38.

<sup>207</sup> *Hamblin v. Bishop (C. O.)* 41 Fed. 74; *White v. Thayer*, 121

But this doctrine rests upon no valid foundation, and is opposed to the great weight of the authorities. In an English decision of the highest authority we find the following language: "It is said '*ignorantia juris haud excusat*,' but in the maxim this word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may also be the result of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."<sup>208</sup> So it was said by a distinguished text-writer: "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relations, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."<sup>209</sup> And these views are amply supported by the authorities.<sup>210</sup> Under this rule, for example, a transfer to a creditor for the whole debt by a joint debtor, erroneously believing himself bound in *solido*, will be rescinded, reserving the creditor's right to recover the party's portion of the debt in an action

Mass. 226; *Kleimann v. Gleselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761.

<sup>208</sup> *Cooper v. Phibbs*, L. R. 2 H. L. 148.

<sup>209</sup> 2 Pomeroy, Eq. Jur. § 849.

<sup>210</sup> *Stoeckle v. Rosenheim* (Del. Ch.) 87 Atl. 1006; *In re McFarlin*, 9 Del. Ch. 430, 75 Atl. 281; *Gefken v. Graef*, 77 Ga. 340; *Bottomff v. Lewis*, 121 Iowa, 27, 95 N. W. 262; *Macklem v. Bacon*, 57 Mich. 334, 24 N. W. 91; *Hoy v. Hoy*, 93 Miss. 732, 48 South. 903, 25 L. R. A. (N. S.) 182, 136 Am. St. Rep. 548, 17 Ann. Cas. 1137; *Powell v. Plant* (Miss.) 23 South. 399; *Healy v. Healy*, 76 N. H. 504, 85 Atl. 156; *Champlin v. Laytin*, 1 Edw. Ch. (N. Y.) 467; *Altgelt v. Gerbic* (Tex. Civ. App.) 149 S. W. 233; *Toland v. Corey*, 6 Utah, 392, 24 Pac. 190; *Burton v. Haden*, 108 Va. 51, 60 S. E. 736, 15 L. R. A. (N. S.) 1038.

against the joint obligors.<sup>211</sup> So where, under a mutual mistake, one purchases land with the understanding that it belongs to another, when in fact it belongs to himself, he is entitled to equitable relief by cancellation of the contract unless the circumstances are such that it would be inequitable to do so.<sup>212</sup> On the same principle, where a mortgage was discharged and canceled under the mistaken belief that the complainant was the owner of the equity of redemption, it was held that a court of equity should relieve him from the consequences of his mistake.<sup>213</sup> And where one entitled to a large property conveyed the whole of it in return for the release of a small portion, in ignorance of his rights, and the conveyance appeared to have been induced either through the fraud or the gross negligence of his attorney in permitting him to consent to claims set up by his adversary with knowledge that they were unfounded, it was held that the conveyance should be set aside.<sup>214</sup>

§ 149. **Same; Mistake as to Legal Effect of Instrument.** A mistake as to the purport of a written instrument is so far analogous to a mistake of fact as to justify the granting of relief in equity. That is, where a writing purporting to evidence an agreement of the parties fails, because of a mistake of law, to express their intention and the agreement which they actually made, equity will cancel the instrument, or otherwise relieve against it, as if the failure of the writing to express the real contract had been caused by a mistake of fact.<sup>215</sup> Thus, where the parties and sureties executing a bond supposed it was only in the nature of a bail bond, securing the appearance of a party before the court when required, whereas the legal import of its terms

<sup>211</sup> *Barthet v. Andry*, 14 La. 30.

<sup>212</sup> *Houston v. Northern Pac. Ry. Co.*, 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325.

<sup>213</sup> *Villet v. Cowenhoven*, 83 N. J. Eq. 234, 90 Atl. 681.

<sup>214</sup> *Eysaman v. Nelson*, 79 Misc. Rep. 304, 140 N. Y. Supp. 183.

<sup>215</sup> *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174, 5 L. Ed. 589; *North-west Eckington Imp. Co. v. Campbell*, 28 App. D. C. 483; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125; *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20; *Tygar v. Cook*, 77 N. J. Eq. 300, 78 Atl. 23; *Sinclair v. Sinclair*, 149 App. Div. 949, 134 N. Y. Supp. 114; *Kelley v. Ward* (Tex. Civ. App.) 58 S. W. 207; *Zieschang v. Helmke* (Tex. Civ. App.) 84 S. W. 436.

made it also a security for the performance of the judgment or decree to be finally entered, it was considered that the bond had been executed under a mutual mistake as to its legal purport; and since the bond could not be reformed (some of the parties to it being dead) it was held that the surviving party was entitled to an injunction restraining proceedings thereon against him.<sup>216</sup> And where it is shown that the parties, through ignorance and mistake, prepared and executed an instrument which conveyed an estate in fee simple to a woman and her heirs, whereas their real intention was to make provision for her children as well as for herself, and to convey the land to her for life with remainder to the children, the mistake may be corrected in equity.<sup>217</sup> So, in a case in Ohio, the plaintiff bargained for the purchase of a tract of land and paid the whole of the purchase money. He was to receive a warranty deed on the completion of a survey thereafter to be made. The vendor died and his administrator obtained an order of the probate court authorizing him to convey the land to the purchaser according to the agreement of the intestate. He undertook to make such a conveyance, but by mistake omitted to insert any covenant of warranty, and represented to the purchaser that the deed offered to him was in pursuance of the agreement and the order of the court. The purchaser was ignorant of the effect of the words used, and accepted the deed in the belief that, if the title failed, it would give him a complete remedy against the heirs of the vendor. He was afterwards evicted by a stranger holding a paramount title, and brought his bill in equity for relief, which was granted.<sup>218</sup> But in order to claim the benefit of this rule, the complaining party must clear himself from the imputation of negligence or carelessness. Thus, where a person has an opportunity to read a mortgage before signing it, but declines to do so or to have it read or explained to him, preferring to rely on the assurances of a third person as to its contents, he cannot afterwards avoid it on the ground

<sup>216</sup> *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, 35 L. Ed. 678.

<sup>217</sup> *Clayton v. Freet*, 10 Ohio St. 544.

<sup>218</sup> *Evants v. Strobe's Adm'r*, 11 Ohio, 480, 38 Am. Dec. 744.

of mistake, in that the instrument is different from what he supposed it was, where the mortgagee was not guilty of any fraud or deception.<sup>219</sup> So where the vendors under a contract for the sale of land had no definite understanding as to the precise form of the documents they were to execute, but were willing to sign any papers which their attorney advised, instruments conveying the land to the United States, and authorizing the grantee to select lieu lands, were held to be neither forgeries nor void for fraud.<sup>220</sup>

But on the other hand, if a written instrument is just what the parties intended it to be, and expresses the intention which they had in mind at the time, so that there is no mistake as to its purport, it cannot be rescinded, nor can other equitable relief be given against it, because of a mistake or misunderstanding of one or both of the parties concerning the legal consequences or effects of the writing.<sup>221</sup> For instance, where the grantor in a deed of trust or settlement understands its purport and voluntarily executes it, without any fraud or undue influence, he cannot have it set aside because he did not fully understand its legal effect.<sup>222</sup> So if the grantee understands that a deed absolute on its face is to operate as an absolute conveyance, and is not guilty of any fraud in procuring it, it cannot be set

<sup>219</sup> *Snelgrove v. Earl*, 17 Utah, 321, 53 Pac. 1017. As to negligence precluding relief, in signing an instrument without reading it, see, *supra*, §§ 52-57.

<sup>220</sup> *United States v. Conklin* (C. C.) 169 Fed. 177.

<sup>221</sup> *Seeley v. Reed* (C. C.) 25 Fed. 361; *First Nat. Bank v. Shank*, 53 Colo. 446, 128 Pac. 56; *De Give v. Healey*, 60 Ga. 391; *Carter v. Love*, 206 Ill. 310, 69 N. E. 85; *Tilton v. Fairmount Lodge*, 149 Ill. App. 530; *Ruby v. Ewing*, 49 Ind. App. 520, 97 N. E. 798; *Grant v. Isett*, 81 Kan. 246, 105 Pac. 1021; *Talbott's Devisees v. Hooser*, 12 Bush (Ky.) 408; *Euler v. Schroeder*, 112 Md. 155, 76 Atl. 164; *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952; *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20; *Corrigan v. Tlernay*, 100 Mo. 276, 13 S. W. 401; *Hinchman v. Emans*, 1 N. J. Eq. 100; *Leszynsky v. Ross*, 85 Misc. Rep. 652, 72 N. Y. Supp. 352; *Ames v. Moore*, 54 Or. 274, 101 Pac. 769; *McAninch v. Laughlin*, 13 Pa. 371; *Moore v. Studebaker Bros. Mfg. Co.* (Tex. Civ. App.) 136 S. W. 570. Compare *Sandlin v. Ward*, 94 N. C. 490.

<sup>222</sup> *Coleman v. Fidelity Trust & Safety Vault Co.*, 28 Ky. Law Rep. 1263, 91 S. W. 716; *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918; *Taylor v. Buttrick*, 165 Mass. 547, 43 N. E. 507, 52 Am. St. Rep. 530; *Wright v. Tallmadge*, 15 N. Y. 307.



aside because the grantor understood that it was intended as a mortgage.<sup>223</sup> And so a license to use a patented article cannot be rescinded on the ground of a mistake as to its legal effect, as, in supposing that it applied only to the use of the article in connection with one particular machine then in existence, whereas legally it gave the licensee the right to apply it to all machines of that kind thereafter made or used by him.<sup>224</sup>

But even in this modified form, the rule against granting relief on account of mistakes of law has been subject to some qualifications and exceptions. In Georgia, it is provided by statute that "an honest mistake of law as to the effect of an instrument, on the part of both contracting parties, when such mistake operates as a gross injustice to one, and gives an unconscientious advantage to the other, may be relieved in equity."<sup>225</sup> So, in Texas, it is said that the fact that a person did not understand what he was doing when he executed a mortgage, and that the officer taking the acknowledgment did not explain it to him, will not defeat the mortgage, unless these facts are brought to the knowledge of the mortgagee.<sup>226</sup> Also it appears that, in cases where great hardship or injustice is likely to result, equity will be quick to lay hold on any attending circumstance which indicates fraud, undue influence, or imposition on the part of the person benefiting by the transaction, as, for instance, where the mental condition of the other party is such as to impose the duty of making a full and clear explanation.<sup>227</sup> And it has been thought that relief in equity should be granted where a mistake was made, not as to the existence or non-existence of a certain statute, but as to its legal effects on the rights of the parties.<sup>228</sup>

**§ 150. Same; Mistake of Law Induced by Other Party.** A mistake of law, existing in the mind of one of the parties to a contract, will be remediable in a court of equity when

<sup>223</sup> *Irvin v. Johnson*, 56 Tex. Civ. App. 492, 120 S. W. 1085.

<sup>224</sup> *Illingworth v. Spaulding* (C. C.) 43 Fed. 827.

<sup>225</sup> Civ. Code Ga., 1910, § 4576. And see *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785.

<sup>226</sup> *Beattle v. Keller* (Tex. Civ. App.) 49 S. W. 408.

<sup>227</sup> *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20.

<sup>228</sup> *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303.

it was induced or brought about by false representations made by the other party, or by such conduct on his part as makes it inequitable for him to take advantage of it.<sup>229</sup>

"There are cases in which this court will interfere upon the ground of such mistake [of law] to relieve a party from the effect of his contract, as, for instance, if one is ignorant of a matter of law involved in the transaction, and the other, knowing him to be so, takes advantage of that circumstance to make the contract, there the court will relieve, though perhaps more properly on account of fraud in the one party than of ignorance of the law in the other."<sup>230</sup>

Thus, where a vendor is induced by fraudulent representations to sign a contract under which the purchaser buys the property "subject to" and not "assuming" a certain debt, the courts will refuse enforcement of the contract, even though the vendor read the contract, if he did not understand its legal effect.<sup>231</sup> This rule applies with special force where the personal or business relations of the two parties are such that one naturally places reliance upon the information or advice which the other gives him. Where one has the right to rely upon another and does so rely, and the latter omits to state a most material legal consideration within his knowledge and affecting the other's rights, but of which that other is ignorant, and acts under this misplaced confidence and is misled by it, a court of equity will afford relief, especially if such action inures to the advantage of the person whose advice is taken, even though no fraud was intended.<sup>232</sup> But it is not so clear that relief should be given where one party does nothing to induce the mistake of law in the mind of the other, but merely, being aware that it exists, keeps silent and does nothing to enlighten him. In a case in Maine, it is said that

<sup>229</sup> *Medical Society of South Carolina v. Gilbreth* (D. C.) 208 Fed. 899; *Dill v. Shahan*, 25 Ala. 694, 60 Am. Dec. 540; *Carr v. Dickson*, 58 Ga. 144; *Montgomery Door & Sash Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N. E. 71; *Gunter v. Thomas*, 1 Ired. Eq. (36 N. C.) 199; *Drew v. Clarke*, 3 Tenn. (Cooke) 374, 5 Am. Dec. 698; *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811.

<sup>230</sup> *Champlin v. Laytin*, 6 Paige (N. Y.) 189.

<sup>231</sup> *Parker v. Naylor* (Tex. Civ. App.) 151 S. W. 1096.

<sup>232</sup> *Tompkins v. Hollister*, 60 Mich. 470, 27 N. W. 651.

if equity will ever relieve one who has entered into a transaction under a misapprehension of its effect, when the other party merely failed to correct such misapprehension, there being no such peculiar relation between the parties as to place the one who remains silent under any unusual obligation, such party must himself have appreciated the legal effect of the transaction, and must have known that the other was acting in ignorance of such effect.<sup>233</sup>

**§ 151. Same; Mistake of Law as Element of Fraud.—**The doctrine which makes parties bear the consequences of mistakes of law is often productive of hardship, and can be maintained only on grounds of general policy. It is not so universal as to exclude relief in cases where mistake of law is only one element of the case presented to a court of equity, and is combined with the fraud or misconduct of the other party.<sup>234</sup> "Ignorance of the law may be one of the ingredients of fraud on which the court will act, for when there is gross ignorance or a plain and palpable mistake of a plain and familiar principle of law, it may well give rise to a presumption, with the admixture of other and even slight circumstances, that there has been undue influence, imposition, mental imbecility, surprise, or that the confidence of the party has been abused."<sup>235</sup> Hence it may be stated in general that mistake of law may be ground for relief against a contract, conveyance, or other act, when it is shown to have been accompanied by fraud in any form, such as misrepresentation or concealment of facts, duress, imposition, undue influence, surprise, or misplaced confidence, or when advantage has been in any way taken of one's ignorance of the law to mislead him, or where there is a relation of trust and confidence which has been abused.<sup>236</sup>

<sup>233</sup> *Eldridge v. Dexter & P. R. Co.*, 88 Me. 191, 33 Atl. 974. And see *Outcult Advertising Co. v. Barnes*, 176 Mo. App. 307, 162 S. W. 631.

<sup>234</sup> *Tabor v. Michigan Mut. Life Ins. Co.*, 44 Mich. 324, 6 N. W. 830; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Graham v. Billings* (Tex. Civ. App.) 51 S. W. 645; *Lawrence v. Beaubien*, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.

<sup>235</sup> *Rankin v. Mortimore*, 7 Watts (Pa.) 372.

<sup>236</sup> *Schuttler v. Brandfass*, 41 W. Va. 201, 23 S. E. 808.

§ 152. **Same; Mutual Mistake of Law.**—A mutual mistake of law occurs where both the parties to a transaction act under a misapprehension of the law as applied to the transaction or to a particular circumstance material to it, both supposing that they know and understand the law, and both making the same mistake. When this occurs, it is ground for the intervention of equity to accord relief against the consequences of the mistake.<sup>237</sup> Thus it is said: "If both parties should be ignorant of a matter of law and should enter into a contract for a particular object, the result whereof would by law be different from what they mutually intended, here, on account of the surprise or immediate result of the mistake of both, there can be no reason why the court should not interfere in order to prevent the enforcement of the contract and relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious advantage of the other, and derive a benefit from a contract which neither of them intended it should produce."<sup>238</sup> For instance, the rule against relieving on account of mere mistakes of law has no application to a case where, on account of the common mistake of both parties, one buys from the other property which he already owns.<sup>239</sup> So, where one has undertaken to give a mortgage on certain of his property, and accordingly an instrument is drawn up and executed which both the parties suppose to be good and sufficient in the character of a mortgage, but which really is invalid as a matter of law, it makes a proper case for the intervention of equity.<sup>240</sup> So a petition for the rescission of a lease of real property should be granted where it appears that the property was leased for the purpose of conducting a meat mar-

<sup>237</sup> *Medical Society of South Carolina v. Gilbreth* (D. C.) 208 Fed. 899; *McCord v. Bright*, 44 Ind. App. 275, 87 N. E. 654; *Silander v. Gronna*, 15 N. D. 552, 108 N. W. 544, 125 Am. St. Rep. 616; *Northwest Thresher Co. v. McNinch*, 42 Okl. 155, 140 Pac. 1170. Compare *Clark v. Carter*, 234 Mo. 90, 136 S. W. 310; *In re Mulholland's Estate*, 224 Pa. 536, 73 Atl. 932, 132 Am. St. Rep. 791.

<sup>238</sup> *State v. Paup*, 13 Ark. 129, 56 Am. Dec. 303.

<sup>239</sup> *Houston v. Northern Pac. Ry. Co.*, 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325.

<sup>240</sup> *Remington v. Higgins*, 54 Cal. 620.

ket, and that both parties were ignorant of the existence of a municipal ordinance prohibiting meat markets in that vicinity, and that the lessor refuses to permit the plaintiff to sublet.<sup>241</sup> In another case, the plaintiff conveyed land to a county for the purpose of erecting a courthouse in the place to which, as both parties supposed, the county seat had been legally removed. The consideration of the transfer was one dollar, the real motive of the plaintiff in making it being the anticipated enhancement in value of his other property in the same place. But afterwards the courts held that the proceedings for the removal of the county seat to that place were void. Thereupon a bill was filed to cancel the deed, and it was held that, the deed being founded on an assumption which was a mutual mistake, it could be relieved against in equity, as the parties could be placed in their original position by requiring the grantor to refund to the county what it had expended for improvements, and to pay the taxes for the years during which the land had been held exempt as county property.<sup>242</sup>

But where the parties to a deed are uncertain as to what estate the vendor has taken under the statutes of descent and distribution, and the land is conveyed under an agreement that, when the law is settled, the vendor shall be paid such proportion of the price as his interest bears to the entire title, this is not a case of mutual mistake of law.<sup>243</sup> And it should be observed that mutuality in a mistake of law does not aid the equities that arise from it, for the court of equity will not interfere unless there is something that makes it inequitable to enforce the obligation over which the mistake has occurred.<sup>244</sup>

**§ 153. Same; Laws of Foreign State or Country.**—It is a familiar principle that the existence and terms of the laws of a foreign country, or of another state of the Union, are not treated in our courts as matters of law, but as matters of fact. Courts, for instance, do not take judicial notice of foreign laws, but require them to be proved as facts. This rule

<sup>241</sup> *Altgelt v. Gerbic* (Tex. Civ. App.) 149 S. W. 233.

<sup>242</sup> *Griffith v. Sebastian County*, 49 Ark. 24, 3 S. W. 886.

<sup>243</sup> *Hamilton v. Havercamp*, 37 Okl. 41, 130 Pac. 259.

<sup>244</sup> *Macklem v. Bacon*, 57 Mich. 334, 24 N. W. 91.

applies to individuals in their dealings with each other. No one is bound to know the terms of a law of a foreign state or country, and hence a mistake in respect to such matters may justify the rescission of a contract or conveyance in the same circumstances and under the same conditions as any other mistake of fact.<sup>245</sup> Thus, for example, a mistake made by the wife and the mother of a decedent as to the law of descent of a state other than that of their residence, which led to a transfer of land of the decedent to the mother, when, under the statute, the wife was entitled to all of it, is a mistake of fact against which equity will grant relief.<sup>246</sup>

**§ 154. Loss or Injury Resulting From Mistake.**—It has sometimes been laid down as a general rule that a court of equity should not rescind a contract on the ground of mistake unless the complaining party shows that the mistake has resulted, or will result, in some substantial loss or injury to himself.<sup>247</sup> And this showing is not made, it is thought, where the other party to the contract is able and willing to correct the mistake,<sup>248</sup> or where the party seeking to be relieved entered into the contract as a speculating bargain, and hence may be presumed to have contemplated the possibility of loss or damage.<sup>249</sup> These principles were applied in a case where the bill was brought to set aside a trust deed on the ground that it did not conform to the directions of the grantor, and that it was executed by mistake. It appeared that, while some of the provisions may have been displeasing to the grantor, yet the deed did accomplish his purpose in a general way, and there was no evidence that his instructions, which were not specifically

<sup>245</sup> *King v. Doolittle*, 1 Head (Tenn.) 77; *Rosenbaum v. United States Credit-System Co.*, 64 N. J. Law, 34, 44 Atl. 966; *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262; Civ. Code Cal., § 1579; Rev. Civ. Code Mont., § 4985; Rev. Civ. Code N. Dak., § 5300; Rev. Civ. Code S. Dak., § 1208; Rev. Laws Okl. 1910, § 910.

<sup>246</sup> *Osincup v. Henthorn*, 89 Kan. 58, 130 Pac. 652, 46 L. R. A. (N. S.) 174, Ann. Cas. 1914C, 1262.

<sup>247</sup> *Morse v. Beale*, 68 Iowa, 463, 27 N. W. 461; *Powe v. Culver*, 81 Conn. 49, 69 Atl. 1050.

<sup>248</sup> *Evans v. Bolling*, 5 Ala. 550.

<sup>249</sup> *Lawrence v. Beaublen*, 2 Bailey (S. C.) 623, 23 Am. Dec. 155.

proved, had been misunderstood or disobeyed. It was held that the bill should be dismissed.<sup>250</sup>

But it is believed that the better rule for this class of cases would be that which is applied to rescission on the ground of fraudulent representations, namely, that if the complaining party has received the very thing he bargained for, but complains of misrepresentations as to its quality, character, extent, etc., he must show loss or injury, but that, if something else is fraudulently substituted for that which he expected to acquire, he may have rescission without showing its inferiority or his resulting damage.<sup>251</sup> On this rule, where a bill is brought to cancel a deed of land on the ground of mistake as to the subject-matter, it is no defense that the tract actually conveyed is worth as much as the one which the plaintiff contracted to buy.<sup>252</sup> So, in another case, complainant bought the charter of a bank, having seen only an attested copy of it, from which was omitted a clause reserving to the legislature the power of repealing it. Subsequently the legislature did repeal the charter, and complainant filed his bill for a rescission of the sale. It was held that, the existence of the repealing power being a defect which made the contract different from that which either of the parties understood or intended, it was not material that it had not been used at the date of the contract, or that, so far as then appeared, it might never be used.<sup>253</sup>

**§ 155. Evidence to Prove Mistake.**—A contract will not be rescinded or modified in equity on the ground of mistake in its terms or provisions or as to the subject-matter, unless such mistake is established by clear, satisfactory, and convincing proof. It is not enough to show a possibility or even a probability of mistake, but its actual existence must be demonstrated. If the matter is left in doubt, or nothing more than a probability or ground of presumption is established, the contract will be left to stand as it is.<sup>254</sup> It is

<sup>250</sup> *Byrne v. Gunning*, 75 Md. 30, 23 Atl. 1.

<sup>251</sup> *Supra*, § 112.

<sup>252</sup> *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049.

<sup>253</sup> *King v. Doolittle*, 1 Head (Tenn.) 77.

<sup>254</sup> *Ohlander v. Dexter*, 97 Ala. 476, 12 South. 51; *Oller v. Gard*, 23 Ind. 212; *Loviolette v. Butler*, 124 Mich. 580, 83 N. W. 598;



true, however, that it is no obstacle that the mistake must be made out by parol evidence, while the contract has been reduced to writing. But relief will be granted in the case of written instruments only when there is a plain mistake clearly made out by satisfactory proofs.<sup>255</sup> Thus, the fact that a husband paid most of the purchase money is not conclusive evidence that the wife's name was inserted in the deed as the grantee by mistake.<sup>256</sup> In another case, an action was brought to cancel a policy of insurance on the ground that it was by mistake written for five years instead of three years, and there was evidence tending to show such mistake, but both the agent who effected the insurance and the person insured testified that a premium had been paid for a five-year policy, and that the mistake had been made, not in the policy, but in the application for insurance, by inserting "three" instead of "five" years. It was held that the proof did not unquestionably establish a mistake in the policy, and therefore the plaintiff was not entitled to relief.<sup>257</sup> But in a case in West Virginia, it has been said that equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but when it is implied from the nature of the transaction.<sup>258</sup>

§ 156. **Accident or Surprise as Ground for Relief.**—The phrase "accident or surprise," as used in equity jurisprudence, embraces not only various forfeitures due to accidents in the popular sense, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of negligence or misconduct. "Accident" is an unforeseen and unexpected event, occurring external to the party affected by it and of which his own agency is not the proximate cause, whereby, contrary to his wish, he loses some legal right or becomes subjected to some legal liability, and an-

*Thompson v. E. I. Dupont Co.*, 100 Minn. 367, 111 N. W. 302; *Robinson v. Bobb*, 139 Mo. 346, 40 S. W. 938; *Masterton v. Beers*, 31 N. Y. Super. Ct. 406; *Solenberger v. Strickler's Adm'r*, 110 Va. 273, 65 S. E. 566.

<sup>255</sup> *Major v. Ficklin*, 85 Va. 732, 8 S. E. 715.

<sup>256</sup> *Bader v. Dyer*, 106 Iowa, 715, 77 N. W. 469, 68 Am. St. Rep. 332.

<sup>257</sup> *Edmond's Appeal*, 59 Pa. 220.

<sup>258</sup> *Taylor v. Godfrey*, 62 W. Va. 677, 59 S. E. 631.

other person acquires a corresponding legal right, which it would violate good conscience for the latter under the circumstances to retain. The word "surprise" is used interchangeably with "accident" to designate the emergencies giving rise to accidents, both words signifying a detrimental situation wherein a party is placed unexpectedly, and against which ordinary prudence would not have guarded.<sup>259</sup> And where an "accident" occurs which was not anticipated and provided for when the contract was made, and which leaves one of the parties without remedy in a court of law, the jurisdiction of a court of equity may then be invoked to give relief against the accident.<sup>260</sup> But it is said that the "surprise" which will induce equity to interfere and cancel a contract must consist of an overpowering of the will,—a taking away of volition,—so that the act was not that of the party, but of others,<sup>261</sup> and that one is not entitled to relief against an instrument on the ground of surprise, when he had the advice of counsel in doing the act complained of.<sup>262</sup> But when some mental weakness or incapacity for business affairs on the part of the complaining party is shown, and there is ground to believe that he did not understand what he was doing, it seems that equity may interfere on the ground of surprise, even though there is nothing to show any fraud or duress.<sup>263</sup>

<sup>259</sup> *State v. Innes*, 137 Mo. App. 420, 118 S. W. 1168. And see *Engler v. Knoblaugh*, 131 Mo. App. 481, 110 S. W. 16; *West Portland Homestead Ass'n v. Lownsdale* (D. C.) 17 Fed. 614; *Kopper v. Dyer*, 59 Vt. 477, 9 Atl. 4, 59 Am. Rep. 742; *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661, 81 N. W. 849.

<sup>260</sup> *City of Bloomington v. Smith*, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310; *Voliva v. Cook*, 262 Ill. 502, 104 N. E. 711.

<sup>261</sup> *McRae v. Malloy*, 93 N. C. 154.

<sup>262</sup> *Sandlin v. Ward*, 94 N. C. 490.

<sup>263</sup> *Hoagland v. Titus*, 16 N. J. Eq. 44.

## CHAPTER V

### WANT OR FAILURE OF CONSIDERATION

- § 157. Original Want of Consideration.
- 158. Failure of Consideration.
- 159. Partial Failure of Consideration.
- 160. Failure of Consideration from Impossibility of Performance.
- 161. Failure of Consideration Resulting from Operation of Law or from Change in the Law.
- 162. Instrument Becoming *Functus Officio* by Performance of Conditions.
- 163. Same; Payment or Discharge of Obligation.
- 164. Depreciation in Value of Consideration.
- 165. Forged and Counterfeit Documents and Stolen Goods.
- 166. Want of Value No Ground for Rescission Where Consideration is Delivered as Stipulated.
- 167. Changing Bargains and Speculative Purchases.
- 168. Grants in Consideration of Support and Maintenance.

§ 157. **Original Want of Consideration.**—An entire want of consideration to support a contract or conveyance, existing at the time it was made, will be ground for its rescission or cancellation, provided no rights of third parties have intervened, and provided that any benefits received under it can be restored, so that the parties can be replaced in their original positions.<sup>1</sup> Thus, equity will not enforce against the estate of the maker the collection of notes under seal in the hands of the payee, which were given to him by the decedent of his own free will and accord, simply with the desire of benefiting him and without consideration.<sup>2</sup> And where complainant executed a deed to defendant without consideration, for the purpose of depriving himself of the power of squandering the property under the influence of his wife, and not for any fraudulent purpose, he is entitled to a decree canceling the deed at his election.<sup>3</sup> Again, a contract to give security for a note,

<sup>1</sup> *Baltimore & O. R. Co. v. Evans*, 188 Fed. 8, 110 O. C. A. 158; *Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 763; *Ricketts v. Tompkins*, 73 N. J. Eq. 552, 68 Atl. 1075. See *Copley v. Flint*, 6 Rob. (La.) 54. The case of revoking a gift or donation stands upon a different footing and will be considered in a later chapter. See, *infra*, §§ 497-511.

<sup>2</sup> *Selby v. Case*, 87 Md. 459, 39 Atl. 1041.

<sup>3</sup> *Bybee v. Bybee*, 45 Wash. 187, 87 Pac. 1122. But as to the gen-

made after the execution of the note, may be avoided for want of consideration.<sup>4</sup> And where a person who owned a quantity of iron ore which was stored on a railroad dock gave an order to the railroad company to deliver a part of it to a furnace company, merely as an accommodation to the latter and without any consideration, it was held that the order could be revoked at any time before the furnace company took possession.<sup>5</sup>

A case of original and entire want of consideration, justifying rescission as above stated, may arise where an article sold is entirely worthless.<sup>6</sup> And a parallel case arises where a creditor received in full payment and discharge of the debt a note of a third person, who is insolvent, both the debtor and creditor acting in ignorance of that fact.<sup>7</sup> Where the subject of sale is an invention or a patent, it must be shown to be entirely without value (not merely of doubtful value) before a want of consideration can be said to exist. Thus, an invention is not valueless, so as to avoid a contract for its sale, where it does not appear that it is not patentable, and the purchaser, though testifying that, in its present condition, it is impracticable, admits that "the idea is there" and might be used with some alteration.<sup>8</sup> And as to patents, it has been said: "Whether on the sale of a patent which proves to be worthless there is a failure of consideration, depends not on the utility or pecuniary value of the patent, but solely on its validity. This validity may be questioned on such an issue, in the same manner as in a suit for infringement, and it may be shown that the patent ought not to have been granted."<sup>9</sup>

Again, a want of consideration may arise out of the fact that a security given in exchange for a thing of value is

eral rules which govern the revocability of trust deeds and settlements, see, *infra*, §§ 358-368.

<sup>4</sup> *Roberts v. Waters*, 9 Iowa, 434.

<sup>5</sup> *Staake v. Pennsylvania R. Co.*, 231 Pa. 466, 80 Atl. 1102.

<sup>6</sup> *Coca-Cola Bottling Co. v. Anderson*, 13 Ga. App. 772, 80 S. E. 32. So where an entirely worthless note is given in exchange for land. *Rutherford v. White* (Tex. Civ. App.) 174 S. W. 930.

<sup>7</sup> *Roberts v. Fisher*, 65 Barb. (N. Y.) 303.

<sup>8</sup> *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279.

<sup>9</sup> 1 *Benj. Sales* (Corbin's edn.) § 620, note, citing *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435.

void in law, as, for example, a note or bond and mortgage given by a married woman alone in a jurisdiction where wives are not permitted to execute such instruments without the joinder of their husbands.<sup>10</sup> And so, where one deeds property in exchange for a lease of an academy, which lease is executed to him by trustees in violation of the terms of the trust deed under which they hold the academy, not only should the lease be set aside, but also the deed should be canceled.<sup>11</sup> But a somewhat antagonistic ruling appears in a case in New York, in which a purchaser of land gave in part payment the note of a corporation, executed by himself as president, but without any authority from the corporation. It was held that this was no ground for rescinding the sale at the suit of the vendor, where it also appeared that the purchaser gave the note in good faith and believing that he had the right to execute it, and that the vendor's only remedy was an action against the purchaser for the amount of the note.<sup>12</sup> And the fact that one of the parties to a contract for the exchange of certain parcels of land, after securing a removal of the incumbrances thereon, borrowed the amount necessary to do this, as to his parcel, out of funds held by him in the capacity of a guardian, without first obtaining leave of court so to do, is no ground upon which the other can base an action to cancel the contract.<sup>13</sup>

Where the want of consideration is entire, but extends only to a part of that which is the subject of the contract, rescission is not always the proper remedy. Thus, one who has sold and delivered goods and accepted payment cannot rescind the contract and replevy the goods on the ground that the goods delivered included some which were not purchased, but his only right is to take out the excess in such manner as not to inconvenience the purchaser.<sup>14</sup> And where it was stipulated, in a contract for the sale of land, that a deduction should be made from the price agreed on

<sup>10</sup> *Heacock v. Fly*, 14 Pa. 540; *Foxworth v. Bullock*, 44 Miss. 457.

<sup>11</sup> *Hendrix College v. Arkansas Townsite Co.*, 85 Ark. 446, 108 S. W. 514.

<sup>12</sup> *Miller v. Reynolds*, 72 Hun, 482, 25 N. Y. Supp. 642.

<sup>13</sup> *Kraner v. Chambers*, 92 Iowa, 681, 61 N. W. 373.

<sup>14</sup> *De Graff v. Byles*, 63 Mich. 25, 29 N. W. 487.

in case part of the land should be lost, and it appeared that such stipulation was inserted with reference to a claim which turned out to be much larger than the contractor supposed, it was held, the value of the residue not being materially impaired for the purpose for which it was bought, and there being no evidence of fraud or imposition, that the contract should not be rescinded.<sup>15</sup>

§ 158. **Failure of Consideration.**—A failure of consideration is to be distinguished from an original want of consideration. As applied to notes, contracts, conveyances, and other transactions, the former term does not mean that no consideration ever existed, but imports that a consideration, existing at the inception of the transaction and actually or supposedly good, has since become worthless or has ceased to exist, or has been extinguished, partially or entirely.<sup>16</sup> And an entire failure of consideration is sufficient ground in equity for the rescission of a contract or the cancellation of a conveyance.<sup>17</sup> This rule is well recognized in equity jurisprudence, and moreover it is enacted into statute law in some of the states, as in the codes which provide that “a party to a contract may rescind the same . . . . .if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part; if such consideration becomes entirely void from any cause; or if such consideration, before it is rendered

<sup>15</sup> *Harris v. Granger*, 4 B. Mon. (Ky.) 369.

<sup>16</sup> *Shirk v. Nelble*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150; *Crouch v. Davis*, 23 Grat. (Va.) 75; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 920.

<sup>17</sup> *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17,181; *Pettibone v. Roberts*, 2 Root (Conn.) 258; *Steele v. Hobbs*, 16 Ill. 59; *Woodward v. Fels*, 1 Bush (Ky.) 162; *Robinson v. Bright*, 3 Metc. (Ky.) 30; *Mechanics' & Traders' Ins. Co. v. McLain*, 48 La. Ann. 1091, 20 South. 278; *Spring v. Coffin*, 10 Mass. 31; *Griggs v. Morgan*, 9 Allen (Mass.) 37; *Hotchkiss v. Judd*, 12 Allen (Mass.) 447; *Julius Kessler & Co. v. Parelius*, 107 Minn. 224, 119 N. W. 1069, 131 Am. St. Rep. 459; *Leach v. Tilton*, 40 N. H. 473; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Smith v. McCluskey*, 45 Barb. (N. Y.) 610; *Putnam v. Westcott*, 19 Johns. (N. Y.) 73; *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *French v. Millard*, 2 Ohio St. 44; *Darst v. Brockway*, 11 Ohio, 462; *Carter v. Walker*, 2 Rich. (S. C.) 40; *Morrill v. Aden*, 19 Vt. 505; *Hurd v. Hall*, 12 Wis. 112. Compare *Soper v. Stevens*, 14 Me. 133.

to him, fails in a material respect from any cause.”<sup>18</sup> But it is to be noted that if a consideration is once paid or rendered and accepted, its subsequent failure, not in any way attributable to the fault of the party giving it, is not ground for rescission. Thus, in a case in Illinois, the complainant granted and conveyed premises to a corporation, receiving certain certificates of stock in the company as the consideration. Afterwards these certificates were surreptitiously taken from him by a person to whom the grantee had subsequently conveyed the premises. But this was held to be no ground for setting aside the complainant’s deed.<sup>19</sup> Moreover, it cannot be said that there has been a failure of consideration unless it appears that the change in its existence, value, or validity has resulted, or will result, in some substantial loss or injury to the party complaining.<sup>20</sup>

To illustrate these principles, it has been held that equitable ground for rescission is shown by a bill to cancel plaintiff’s indorsement of certain notes, which states that the notes were given by an employé of defendants to cover his shortage in his accounts with them, and were indorsed by plaintiff on condition that defendants should retain the employé in their service, and apply a portion of his salary on the notes each month until their maturity, and that defendants, shortly afterwards, without notice to plaintiff, discharged the employé solely because his shortage was greater than the amount of the notes, and that some of the notes are not yet due.<sup>21</sup> So, where a purchaser of personal property agrees to transfer and indorse to the seller, as payment, the notes of a third person, the seller, on refusal of the purchaser to make the indorsement, may rescind the sale and recover the value of the property delivered, and not merely the damages sustained from the purchaser’s refusal to indorse the notes.<sup>22</sup> So again, where a wife pro-

<sup>18</sup> Civ. Code Cal., § 1689; Rev. Civ. Code Mont., § 5063; Rev. Civ. Code N. Dak., § 5378; Rev. Civ. Code S. Dak., § 1283; Rev. Laws Okl. 1910, § 984.

<sup>19</sup> *Hayden v. Hayden*, 241 Ill. 183, 89 N. E. 347.

<sup>20</sup> *Garber v. Sutton*, 96 Va. 469, 31 S. E. 894.

<sup>21</sup> *MacLean v. Fitzsimons*, 80 Mich. 336, 45 N. W. 145.

<sup>22</sup> *Hayden v. Reynolds*, 54 Iowa, 157, 6 N. W. 180. But compare *Lowry v. Higgins*, 5 Ind. 507.



cures her husband to convey certain property to her, under threats not to live with him unless he does so, and on obtaining the conveyance lives with him for only a few days, and then, without any apparent cause, deserts him and severs their marital relations, the conveyance will be set aside at the suit of the husband.<sup>23</sup> It is said, however, in some cases, that it is only when the consideration is fully executed that it can fail so as to enable the party receiving it to avoid his executory undertaking founded thereon.<sup>24</sup> And hence the failure to keep promises made to induce the making of a contract will not sustain a suit to set the contract aside.<sup>25</sup>

§ 159. **Partial Failure of Consideration.**—In several of the states, it is expressly provided by statute that a party to a contract may rescind the same when the consideration for his obligation fails in whole or in part.<sup>26</sup> Aside from enactments of this kind, the general rule appears to be that a partial failure of consideration will justify the rescission or cancellation of an obligation in equity if the contract is entire and the consideration therefore not apportionable.<sup>27</sup> Thus, where a person exchanged his land for three land warrants and a certain amount of money, but two of the warrants proved to be invalid and the locations thereunder were canceled, it was held that he was entitled to a rescission of the contract on tendering a return of the warrants and the money received.<sup>28</sup> So, where land is ex-

<sup>23</sup> *Hursen v. Hursen*, 212 Ill. 377, 72 N. E. 391, 103 Am. St. Rep. 230. An almost exactly similar case in Minnesota was decided the other way. But it was apparently because the husband sought to cancel his conveyance on the ground of fraud (rather than of failure of consideration), and did not allege or show any material fact evidencing a fraudulent intent on the part of the wife at the time of the transfer. *Hodsden v. Hodsden*, 69 Minn. 486, 72 N. W. 562.

<sup>24</sup> *Crawford v. Beard*, 4 J. J. Marsh. (Ky.) 187.

<sup>25</sup> *Van Sickle v. Harmeyer*, 172 Ill. App. 218.

<sup>26</sup> Civ. Code Cal., § 1689; Rev. Civ. Code Mont., § 5063; Rev. Civ. Code N. Dak., § 5378; Rev. Civ. Code S. Dak., § 1283; Rev. Laws Okl. 1910, § 984. And see *Sterling v. Gregory*, 149 Cal. 117, 85 Pac. 305; *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755.

<sup>27</sup> *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300; *Parham v. Randolph*, 4 How. (Miss.) 435, 35 Am. Dec. 403; *Case v. Fishback*, 10 B. Mon. (Ky.) 40.

<sup>28</sup> *Colson v. Smith*, 9 Ind. 8.

changed for chattels, failure to deliver a part of the chattels designated and agreed on is a partial failure of consideration which will warrant rescission.<sup>29</sup> And where a purchaser of land is evicted from one-third of the property, he may have the sale canceled in toto and be relieved from payment of the price.<sup>30</sup> And in an action on a note given for certificates to whisky in a government warehouse, which were delivered when the note was given, a defense setting up an agreement of the plaintiff to loan defendant certain money as a part consideration of the note, and a refusal of plaintiff to carry out the contract, entitles the defendant to rescind it.<sup>31</sup> Again, where a vendor sold, without any reservation, certain premises on which were fixtures placed there by a tenant, and the tenant, before the execution of the deed, removed the fixtures, it was held that the purchaser was not liable at law for refusal to perform the contract.<sup>32</sup>

But some of the authorities maintain that a failure of consideration must be entire, in order to warrant the rescission of a contract, unless there are circumstances of fraud in the case or some other ground of equitable jurisdiction,<sup>33</sup> and that a partial failure of consideration will not be enough for this purpose, if the resultant injury is capable of being compensated in some other way or of being redressed by an action at law.<sup>34</sup> Thus where one sold land together with an apartment house then in process of construction on the premises, giving a deed and taking a mortgage for the unpaid portion of the purchase money, and undertook to complete the building by a certain date, at which time the last installment of the price was to be paid, it was held that his omission to put fire escapes on

<sup>29</sup> *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114.

<sup>30</sup> *McCollom v. McCollom*, 6 Rob. (La.) 506.

<sup>31</sup> *Julius Kessler & Co. v. Parelius*, 107 Minn. 224, 119 N. W. 1069, 131 Am. St. Rep. 459.

<sup>32</sup> *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544.

<sup>33</sup> *Stephenson v. Atlas Coal Co.*, 147 Ala. 432, 41 South. 301; *Kauffman Milling Co. v. Stuckey*, 37 S. C. 7, 16 S. E. 192; *Hewett v. Dole*, 69 Wash. 163, 124 Pac. 374.

<sup>34</sup> *Yard v. Patton*, 13 Pa. 278; *Becker v. City of Philadelphia*, 5 Pa. Co. Ct. R. 97.

the building was a mere partial failure of consideration, which would not justify a court of equity in annulling the contract so far as executed and cancelling the conveyance and mortgage, the remedy of the purchaser being the liability of the vendor in damages for his failure to perform his undertaking to complete the building.<sup>85</sup> Again, the contract may be of such a kind that, if it is undone, the parties cannot be restored to their former situation. Thus, where a man deeded land to a woman in consideration of marriage and of her promise to be a kind and dutiful wife, but she failed so to conduct herself, it was held that the failure of consideration was partial, and that equity would not decree rescission, since the wife could not be put in statu quo.<sup>86</sup>

In any event, the consideration alleged to have failed must be the particular consideration for the particular contract in question, and not some extraneous or collateral matter. For instance, the vendor of land cannot repudiate or resist performance of his agreement to convey by showing that the purchaser is indebted to him upon an account, which was not connected with the contract of sale in its inception nor made a part of it by any subsequent arrangement.<sup>87</sup> And equity will not cancel a sale on the ground of partial failure of consideration, where the party complaining had an opportunity to examine, test, or appraise the consideration before completing the contract, and the other party was guilty of no fraud.<sup>88</sup> So, where a contract for the sale of land requires the vendor to furnish an abstract of title, and he gives the vendee notice where such abstract may be found and inspected, and the vendee makes no objection to the failure otherwise to furnish the abstract, he cannot afterwards rescind the contract for failure to furnish it.<sup>89</sup>

<sup>85</sup> *De Kay v. Bliss*, 120 N. Y. 91, 24 N. E. 300.

<sup>86</sup> *Jackson v. Jackson*, 222 Ill. 46, 78 N. E. 19, 6 L. R. A. (N. S.) 785.

<sup>87</sup> *Byrd v. Odem*, 9 Ala. 755.

<sup>88</sup> *Vincent v. Berry*, 46 Iowa, 571. And see *Pope v. Chafee*, 14 Rich. Eq. (S. C.) 69.

<sup>89</sup> *Papin v. Goodrich*, 103 Ill. 86.

§ 160. **Failure of Consideration from Impossibility of Performance.**—Impossibility of performance of a contract may be ground for its rescission, when occurring without fault and by a fortuitous event, as where the subject-matter of the contract perishes or is lost or destroyed, though different rules apply where a party to the contract, by his own act, has disabled himself from performing his obligation. These principles will be more fully discussed in a later chapter.<sup>40</sup> At present we are concerned with the doctrine that there is such a failure of consideration as will warrant rescission when it is impossible for the party undertaking to render the consideration to keep his obligation in this respect. This happens, for instance, where the supposed subject of the contract does not exist. In this event there is no legal obligation and either party may treat the contract as void.<sup>41</sup> This rule has been applied, for instance, in cases where the agreement was based on a supposed judgment, which did not exist,<sup>42</sup> and where the agreement was with respect to the payment of certain taxes on a piece of property, which taxes never had been assessed against it, or were not collectible by law.<sup>43</sup> Again, as to the executory features of a contract with reference to specific property, the obligations assumed clearly contemplating its continued existence, the destruction of the property, without fault, will constitute such a failure of consideration as to discharge the contract.<sup>44</sup> But in the case of an executed contract, the failure of consideration must have existed at or before the completion of the agreement. It is not sufficient that there is a subsequent destruction, failure, or decadence of the consideration. Thus, in a case in California, defendant contracted to convey to plaintiff certain land and certain shares in an irrigation company, which entitled him to a certain amount of water. The plaintiff paid part of the price, took possession, and im-

<sup>40</sup> See, *infra*, Chapter VIII, §§ 208–211.

<sup>41</sup> *Smith v. Gorin*, 2 Duv. (Ky.) 157.

<sup>42</sup> *Gibson v. Pelkie*, 37 Mich. 380.

<sup>43</sup> *State v. Illyes*, 87 Ind. 405.

<sup>44</sup> *Steamboat Co. v. Transportation Co.*, 166 N. C. 582, 82 S. E. 956; *Powell v. Dayton, S. & G. R. R. Co.*, 12 Or. 488, 8 Pac. 544.

proved the land. The irrigation ditches were fed by artesian wells, which, at the time the contract was made, and for five years thereafter, furnished as much water as had been represented, but partially failed the following season. It was held that such failure of the wells did not authorize a rescission of the contract, since, if there was a failure of this part of the consideration, the failure was through no fault of the defendant.<sup>45</sup> So, in Louisiana, a statute provides that if the subject of a sale has perished by a fortuitous event before the purchaser has instituted an action to rescind, he must bear the loss; and it was held that the death of a slave from a fever contracted after he had been sold was a fortuitous event within the meaning of the law.<sup>46</sup>

Impossibility of performance may also arise from the entire unsuitability of the subject to its intended use. This is illustrated by a case in which the plaintiff had been drafted to serve in the army in time of war, and agreed to pay another \$300 to serve as his substitute, and upon his being accepted by the district provost marshal, paid him \$50 and deposited the balance with a third person. But the substitute was rejected by the revisory board on account of age and infirmities, and it was held that the plaintiff was thereupon entitled to recover the \$250 from the depository.<sup>47</sup>

Where the subject of sale is land with the buildings on it, and the buildings are destroyed by fire, the question of rescission as for a failure of consideration appears to depend on the transfer of possession. If the purchaser had been placed in possession before the fire occurred, or even if he was then entitled to immediate possession or to the immediate delivery of a deed, it is held that he must bear the loss and cannot rescind or withdraw from his engagement to purchase.<sup>48</sup> But if there has been no delivery of

<sup>45</sup> *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.

<sup>46</sup> *Kiper v. Nuttall*, 1 Rob. (La.) 46.

<sup>47</sup> *Bibb v. Hunter*, 2 Duv. (Ky.) 494.

<sup>48</sup> *McKechie v. Sterling*, 48 Barb. (N. Y.) 330; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Dowdy v. McLellan*, 52 Ga. 408;

possession, or if there is no immediate right of possession, the question appears to turn on the value of the use of the building as compared with the value of the use of the land. If the land was of little or no value to the purchaser without the building, so that the building constituted the chief element of value, it is considered that the destruction of the building before delivery of possession will excuse the purchaser from performing his contract,<sup>49</sup> but otherwise if the building was a mere appurtenance and not the chief inducement of the purchase.<sup>50</sup> But these rules are not universally admitted. Thus, in a case in Kentucky, it is held that the fact that a storehouse on land contracted to be sold was burned before the vendee was entitled to possession or to the delivery of the deed will not relieve him from his contract obligation, where it does not appear that the burning was caused by any act or omission of the vendor.<sup>51</sup> In California (and some other western states) there is a provision in the code that a party may rescind if the consideration, before it is rendered to him, fails in any material respect; and under this rule it is held that one who has contracted to purchase lands with buildings thereon, and who was not in possession, may rescind upon the destruction of the buildings before the consummation of the contract.<sup>52</sup>

The question of rescission on account of the nonexistence or the exhaustion of the subject-matter has an interesting application in the case of mining leases. These leases often contain a covenant to pay a fixed rent or royalty irrespective of the amount of ore produced, or else a covenant to mine a certain minimum quantity each year, and to pay a royalty on that amount annually, whether mined or not. Whether or not the lessee must continue to pay the stipulated rent or royalty after it is discovered that

*Ely v. Ely*, 80 Ill. 532; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306.

<sup>49</sup> *Smith v. McCluskey*, 45 Barb. (N. Y.) 610.

<sup>50</sup> *Bautz v. Kuhworth*, 1 Mont. 133, 25 Am. Rep. 737.

<sup>51</sup> *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035.

<sup>52</sup> *Conlin v. Osborn*, 161 Cal. 659, 120 Pac. 755. And see *City of Paris Dry Goods Co. v. Spring Valley Water Co.*, 10 Cal. App. 212, 101 Pac. 678.

there is no ore in the mine, or after its exhaustion, depends primarily on the terms of the particular lease. But a broad general rule may be stated as follows: When the lease imports a grant of the minerals in place, and is made with reference to a known and ascertained body of ore or mineral contents, the lessee takes the risk of the quantity, just as he does of the quality. That is, he assumes the risk of a premature exhaustion of the ores. But if it appears from the terms of the lease, or from attending circumstances, that both the existence and quantity of minerals in place are in doubt, neither party giving any promise or guaranty on this point, but leaving the question to be determined by the operations under the lease, then the non-existence or subsequent exhaustion of the minerals will terminate the lessee's liability.<sup>53</sup>

**§ 161. Failure of Consideration Resulting from Operation of Law or from Change in the Law.**—There may be a failure of consideration, such as to warrant the rescission of a contract, when performance of it has become legally impossible on account of the enactment of a statute or ordinance or of a change in the existing law. Thus, where one takes a lease of property for the purpose of setting up a meat market in the building thereon, but the maintenance of such markets in the district where the premises are situated is forbidden by a city ordinance, he may rescind, and his right to do so is not defeated by the fact that he failed to apply to the city council for a permit.<sup>54</sup> So, where land in a city is conveyed for the purpose of opening a street, under an agreement between the grantor and grantee, the sole consideration being the benefit to be derived by the grantor from the street, and an act of the legislature prohibits the parties from laying out the street, and a different plan is adopted by the authorities, a reconveyance will be ordered, as the object of the conveyance has failed.<sup>55</sup>

<sup>53</sup> *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Harlan v. Lehigh Coal & Nav. Co.*, 35 Pa. 287; *Williams v. Guffy*, 178 Pa. 342, 35 Atl. 875; *Cook v. Andrews*, 36 Ohio St. 174; *Ridgely v. Conewago Iron Co. (C. C.)* 53 Fed. 988.

<sup>54</sup> *Altgelt v. Gerbic (Tex. Civ. App.)* 149 S. W. 233.

<sup>55</sup> *Quick v. Stuyvesant*, 2 Paige (N. Y.) 84.



In another case, plaintiffs had purchased imported laces from defendant and paid for them, but the laces were subsequently confiscated by the government for non-payment of customs duties, and it was held that the plaintiffs were entitled to rescind the contract and demand repayment of the price.<sup>56</sup>

BUT on the other hand, where money was paid to the master of a privateer for a share of the prizes which she might take on an intended voyage, and before the commencement of the cruise news of peace arrived, and the cruise was abandoned, it was held that the money could not be recovered back as on a failure of consideration, because, by the return of peace, the enterprise had become unlawful, and each party might equally have foreseen the event.<sup>57</sup> So in a case in Kentucky, the fact that the rental value of leased property, for the purposes named in the contract, was destroyed by the passage of a law prohibiting the sale of intoxicating liquors in the county, was held not to entitle the lessee to have the contract canceled, as the parties must have known that the right to sell liquor on the premises depended on the law.<sup>58</sup> In another case, one granted land to a railroad company in consideration of its agreement to furnish him with annual passes over its lines. Performance of this agreement having become unlawful under an act of Congress prohibiting the issue of such passes, and the property having in the mean time greatly increased in value, it was held that rescission of the conveyance should be denied.<sup>59</sup>

**§ 162. Instrument Becoming Functus Officio by Performance of Conditions.**—"It may be laid down as a general rule that where any description of writing evidencing liability on the part of the maker, whether it be commercial paper, a specialty, or other form of legal obligation, has become extinguished or discharged by subsequent events, as

<sup>56</sup> *Hamrah v. N. N. Maloof & Co.*, 127 App. Div. 331, 111 N. Y. Supp. 509.

<sup>57</sup> *Woodward v. Cowing*, 13 Mass. 216.

<sup>58</sup> *Baughman v. Portman*, 11 Ky. Law Rep. 181. And see *Fred Miller Brewing Co. v. Fleming* (Tex. Civ. App.) 143 S. W. 300.

<sup>59</sup> *Cowley v. Northern Pac. Ry. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559.

by payment or otherwise, so that the writing has become *functus officio*, but where its existence in an uncanceled state might subject the maker to vexatious litigation at a distance of time when the evidence of such extinguishment or discharge may have been lost, or so obscured as to render the party less able to repel the claim, in all these cases a court of equity will extend its preventive justice to call out of existence an instrument which ought not to be used or enforced, and when it is against conscience to permit the party holding to retain it.”<sup>60</sup> On this principle, where the plaintiff, being the owner of certain land, entered into a contract with certain persons to form a corporation and sell such land and collect certain notes, receiving a portion of the proceeds thereof for their compensation, and as a matter of convenience the owner of the land delivered a deed to such persons, but the corporation was never formed and the project was abandoned, and the deed with the notes returned to the owner, it was held that he was entitled to a decree canceling the contract and the deed.<sup>61</sup> Similar relief is proper where a note and mortgage have been executed and placed in the hands of an agent on his undertaking to secure a loan for the principal, but the agent fails in his endeavor and no money is ever received by the principal,<sup>62</sup> or where a contract which has not been performed, the parties having failed to comply with their stipulations, remains a burden on the title to real property.<sup>63</sup> But it is also a general principle that courts of equity will not decree the cancellation of instruments on the ground of their having been paid or performed, so long as the party seeking relief has an adequate remedy at law.<sup>64</sup> On this ground it was held, in a case in Massachusetts, that a bond given by plaintiff to defendant on the dissolution of a partnership between them, conditioned on

<sup>60</sup> *Garrett v. Mississippi & A. R. R. Co.*, 1 Freem. Ch. (Miss.) 70. And see *Wiard v. Brown*, 59 Cal. 194; *Williams v. Shaver*, 100 Ark. 565, 140 S. W. 740.

<sup>61</sup> *Bogard v. Sweet*, 17 Okl. 40, 87 Pac. 669.

<sup>62</sup> *Thielen v. Randall*, 75 Minn. 332, 77 N. W. 992.

<sup>63</sup> *Blight v. Banks*, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

<sup>64</sup> *Butler v. Durham*, 2 Ga. 413. And see *Carter v. Ware Commission Co.*, 46 Tex. Civ. App. 7, 101 S. W. 524; *Citizens' Bank of Senath v. Douglass*, 178 Mo. App. 664, 161 S. W. 601.

the performance by the plaintiff of the contracts which had been entered into by the firm with their customers, would not be canceled in equity on the ground that the condition had been performed, and that the plaintiff's surety refused to deliver up the money deposited with him as security until the bond was discharged, since the plaintiff might perpetuate his evidence of performance (under a statute in force in that state), and since the defendant's right to retain the bond was not affected by plaintiff's contract with his surety.<sup>65</sup>

**§ 163. Same; Payment or Discharge of Obligation.—**Where a debt evidenced by a promissory note, a bond, a mortgage, or other security has been fully paid or otherwise discharged, but the instrument remains outstanding, so as to constitute an apparent liability of the maker and threaten to cause him trouble, he may obtain relief in equity by a decree for its surrender and cancellation.<sup>66</sup> Thus, where an insurance company is not entitled to be subrogated to any of the mortgagee's rights under the mortgage, upon paying him the amount of the mortgage after a loss, and taking an assignment of the mortgage and notes secured by it, the mortgagor may maintain an action against the company to compel the cancellation of the mortgage on the ground that the debt has been paid.<sup>67</sup> Even where the holder of the outstanding obligation claims that there is a balance yet unpaid, if the maker of the obligation alleges full satisfaction of it, this issue may be tried and determined in an action for its cancellation.<sup>68</sup> And where the claim is made that an obligation for the pay-

<sup>65</sup> *Brown v. Boyd*, 158 Mass. 470, 33 N. E. 568.

<sup>66</sup> *Hartley v. Matthews*, 96 Ala. 224, 11 South. 452; *Travelers' Ins. Co. v. Jones*, 16 Colo. 515, 27 Pac. 807; *Fitzmaurice v. Mosler*, 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. Rep. 854; *Rickle v. Dow*, 39 Mich. 91; *Hoberg v. Haessig*, 90 Mo. App. 516; *Canon v. Ballard*, 62 N. J. Eq. 383, 50 Atl. 178; *Overall v. Avant* (Tenn. Ch. App.) 46 S. W. 1031; *Wofford v. Thompson*, 8 Tex. 222. But compare *Mercantile Bank of Norfolk v. Pettigrew*, 74 N. C. 326, holding that one who has paid a note without taking it up, or taking a receipt or other acquittance therefor, cannot maintain an action to have the note canceled.

<sup>67</sup> *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 127 S. W. 72.

<sup>68</sup> *Miller v. Rouse*, 8 Minn. 124 (Gil. 97).

ment of money has been satisfied, not by payment in money, but by the substitution of other securities, or by the delivery and acceptance of chattels in lieu of cash, equity may decree the cancellation of the obligation, if the evidence is clear and convincing.<sup>69</sup>

But while the courts of equity have undoubted jurisdiction thus to cancel instruments which have been paid or otherwise performed, this is a power which should be exerted only in the exercise of a sound discretion,<sup>70</sup> and in the absence of any power in the courts of law to afford adequate and complete relief. It has been said that the maker of a note which has been paid by a third party, in pursuance of an agreement, should not be required to await an attack, but should be entitled to use the facts on which he relies, if they are sufficient, as an offensive weapon, to obtain the cancellation and surrender of the note.<sup>71</sup> But a more conservative doctrine is that, in cases of this kind, equitable relief should not be given unless it appears that from lapse of time the defense of payment may fail, or that there is reason to apprehend vexatious suits by the holder of the outstanding obligation, or that there is some other recognized ground of equitable intervention.<sup>72</sup> In an interesting case in Alabama, where the mortgagee of chattels converted the mortgaged property after the debt had been paid and the legal title had reverted in the mortgagor pursuant to statute, it was held that he could not sue in equity to compel the surrender of the mortgage and its cancellation, because he had an adequate legal remedy by an action of detinue to recover the property, or an action of trover or trespass to recover damages for its conversion; and if the mortgagee took the property by writ of seizure after payment of the debt, and brought detinue to recover it, the mortgagor could set up payment of the debt by way of defense, and if he omitted to do so, and permitted judgment to go against him, he could not then seek the aid of

<sup>69</sup> *Leigh v. Citizens' Sav. Bank*, 31 Ky. Law Rep. 251, 102 S. W. 233; *Bradley v. Kinkead*, 16 Ky. Law Rep. 238.

<sup>70</sup> *Butler v. Durham*, 2 Ga. 413.

<sup>71</sup> *French v. Bellows Falls Sav. Inst.*, 67 Ill. App. 179.

<sup>72</sup> *Dorman v. McDonald*, 47 Fla. 252, 36 South. 52; *Loggie v. Chandler*, 95 Me. 220, 49 Atl. 1059.

equity to obtain a cancellation of the mortgage.<sup>73</sup> And it is ruled that a court of equity will not order the cancellation of a real estate mortgage securing a just debt which has not been paid, at the suit of the mortgagor or of one standing in his place, when the only ground for relief is that the statute of limitations would be available as a defense against its foreclosure.<sup>74</sup>

§ 164. **Depreciation in Value of Consideration.**—That a consideration, stipulated to be given and agreed to be accepted, has depreciated in value before the execution of the contract is not ordinarily ground for rescission, unless the party against whom the rescission is sought is in some way to blame for the shrinkage. The rule on this point is that the right to rescind a contract exists when there has been a material change in the subject-matter, before the final consummation of the agreement, brought about by the act or delay of one of the parties, which the party rescinding did not authorize or assent to.<sup>75</sup> Thus, where a debt is presently payable in the stock of a corporation, and the debtor delays the payment for a long time and until the stock loses its value, there is such a change of the circumstances existing at the time of the contract as will in equity relieve the payee from accepting the stock in payment.<sup>76</sup> In a case in Michigan, the defendant, while owning stock in a corporation, agreed with plaintiff to exchange such stock for land. The deed to the land was executed and placed in the hands of a third person to be delivered when the stock was transferred on the books of the corporation. At a meeting of stockholders, action was taken (in which the defendant participated) to sell and convey all the assets of the corporation for 60 cents on the dollar, leaving the corporation insolvent. The defendant then obtained the transfer of his stock to the plaintiff, and secured the deed to the land without the plaintiff's knowledge. It was held that the plaintiff was authorized to rescind the contract,

<sup>73</sup> *Hardeman v. Donaghey*, 170 Ala. 362, 54 South. 172.

<sup>74</sup> *Tracy v. Wheeler*, 15 N. D. 248, 107 N. W. 68, 6 L. R. A. (N. S.) 516. And see *Sartor v. Wells*, 39 Colo. 84, 89 Pac. 797.

<sup>75</sup> *Harris v. Platt*, 64 Mich. 105, 31 N. W. 135.

<sup>76</sup> *Demarest v. McKee*, 2 Grant Cas. (Pa.) 248.

and that equity would cancel the agreement.<sup>77</sup> And a similar ruling was made in a case where land was conveyed on condition of the rendition to the grantor of a certain proportion of the crops each year, but the grantee refused to perform and allowed the land to run to waste.<sup>78</sup> But a vendee cannot refuse a title to land on the ground that it has depreciated in value since the contract was made, when the vendor is not responsible for the delay in conveying the title.<sup>79</sup>

**§ 165. Forged and Counterfeit Documents and Stolen Goods.**—On the ground of a failure of consideration, a buyer may recover the price paid to the seller, who has warranted the title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to surrender them to the true owner.<sup>80</sup> And so, when a note, bill, bond, certificate of corporate stock, or other instrument proves to have been a forgery, the buyer may rescind and recover the price paid, on the ground that the consideration has failed.<sup>81</sup> The indorsement and transfer of an overdue town order by the payee, for value, raises a contract on his part that the order is genuine and is the legal promise of the town which it purports to be; and the purchaser of it, after it has been adjudged void, may elect to sue such indorser upon his contract, and recover the contents of the order according to its tenor, or to sue for the consideration which he paid for it, with interest.<sup>82</sup>

**§ 166. Want of Value No Ground for Rescission Where Consideration is Delivered as Stipulated.**—Where a party obtains what he contracted for, he cannot avoid his contract on the ground that what he received is less valuable than he supposed or that it has no value at all, unless he shows

<sup>77</sup> *Harris v. Platt*, 64 Mich. 105, 31 N. W. 135.

<sup>78</sup> *Teague v. Teague*, 22 Tex. Civ. App. 443, 54 S. W. 632. But see *Navarro Pub. Co. v. Fishburn*, 2 Posey, Unrep. Cas. (Tex.) 587.

<sup>79</sup> *Styles v. Blume*, 12 Misc. Rep. 421, 33 N. Y. Supp. 620.

<sup>80</sup> *Eichholtz v. Banister*, 17 C. B. (N. S.) 708.

<sup>81</sup> *Westrop v. Solomon*, 8 C. B. 345; *Jones v. Ryder*, 5 Taunt. 488; *Gurney v. Womersley*, 4 El. & Bl. 133.

<sup>82</sup> *Ferguson v. Staples*, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470.

fraud or a mistake as to the subject-matter of the contract.<sup>83</sup> Thus, equity will not relieve against a purchase of land, on the ground of failure of consideration, where the purchaser has received the particular land bargained for, irrespective of its value, if the purchase was not induced by fraud or misrepresentation.<sup>84</sup> So, where a person bought the exclusive right of using a patent in a foreign country, being aware at the time of the purchase that no exclusive right to use the process there could be obtained, but desiring an ostensible grant of the exclusive right with the object of floating a company, it was held that, as he had obtained what he desired and intended to buy, he could not recover the purchase money on the ground of a failure of consideration.<sup>85</sup>

**§ 167. Chancing Bargains and Speculative Purchases.—**Equity looks with very little favor on the plea of a want or failure of consideration, when the complaining party entered into the transaction with full knowledge of its highly speculative character, and with apparent willingness to take the risk of great loss as against the chance of great profit. Thus, the purchaser of a supposed onyx mine is not entitled to rescission though the stone turns out to be limestone, where both the parties understood that the result of a test was uncertain, and the purchaser knew that if the stone proved in advance to be onyx he could not purchase for the price he paid.<sup>86</sup> So, where a party advances several thousand dollars to develop a silver mine, in consideration of which he is to be repaid out of the first product, and to receive in addition a fractional interest in the mine, the contract cannot be avoided on the ground that the property to be conveyed is uncertain, or that the enforcement of the contract would work hardship.<sup>87</sup> A similar rule is applied where the subject of sale is a disputed or litigated title to realty. Thus, in a case in West Virginia, defendant induc-

<sup>83</sup> *Fay v. Richards*, 21 Wend. (N. Y.) 626; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16.

<sup>84</sup> *Pollard v. Lyman*, 1 Day (Conn.) 156, 2 Am. Dec. 63.

<sup>85</sup> *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491.

<sup>86</sup> *Hood v. Todd*, 22 Ky. Law Rep. 837, 58 S. W. 783.

<sup>87</sup> *Waterman v. Waterman* (C. C.) 27 Fed. 827.



ed the plaintiff to sell to him for \$500 all her interest in land worth \$230,000, which had formerly belonged to her and which she and her husband had conveyed to third persons, who were then in possession. Her interest in such land depended upon a defect in her acknowledgment of the deed, which might render it void, but as to the materiality of which legal opinion was divided. It was held that the contract, as to defendant, was one of hazard, and the price was not so inadequate as to warrant a rescission of the sale.<sup>88</sup> So again, where one borrows money, not to meet current obligations nor by reason of financial stringency or the importunity of his creditors, but to embark in a speculation which promises to be largely profitable, and for this purpose concedes highly advantageous terms to the lender of the money, he cannot obtain the aid of equity to rescind the contract or modify its terms.<sup>89</sup>

§ 168. **Grants in Consideration of Support and Maintenance.**—A conveyance of property made in consideration of the grantee's undertaking to support, maintain, and care for the grantor during the remainder of the latter's lifetime may be set aside in equity, and the grantor restored to the possession and enjoyment of the property, if it was procured by fraud practised upon him,<sup>90</sup> or by taking advantage of his known mental incapacity,<sup>91</sup> or if the consideration to be given was grossly and shockingly inadequate in comparison with the value of the property transferred.<sup>92</sup> But whether the neglect or refusal of the grantee to perform his part of the undertaking will justify a rescission, on the ground of a failure of consideration, is a question which has been much debated. It would seem that the typical case of this kind—where an aged parent has stripped himself of his possessions in order to secure a comfortable maintenance during his declining years, which, after all, is refused

<sup>88</sup> *Pennybacker v. Laldley*, 33 W. Va. 624, 11 S. E. 39. And see *Breckenridge v. Waters*, 5 T. B. Mon. (Ky.) 150, 17 Am. Dec. 46; *Fellows v. Smith*, 190 Pa. 301, 42 Atl. 678.

<sup>89</sup> *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267.

<sup>90</sup> *Wampler v. Wampler*, 30 Grat. (Va.) 454.

<sup>91</sup> *Good v. Floyd* (Tenn. Ch. App.) 48 S. W. 687.

<sup>92</sup> *Nixon v. Klise*, 160 Iowa, 238, 141 N. W. 322; *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072.

to him—should make the strongest possible appeal to the justice of a court of equity. And many courts have been firm in declaring that the failure of consideration in such cases is by itself a sufficient ground for their intervention and the grant of the relief asked.<sup>93</sup> But others have shown great hesitation and timidity in dealing with the question, arising chiefly from the idea that it might be possible for “law,” as distinguished from “equity,” to afford some compensation to the injured party. There are numerous decisions to the effect that a deed conveying land in consideration of an agreement to support the grantor cannot be canceled for breach of the promise of support, because the proper remedy is an action at law to recover damages.<sup>94</sup> Other decisions hold that there must be some special ground of equitable jurisdiction shown, other than the mere breach or repudiation of the promise to support, such as fraud in the procuring of the conveyance or undue influence or imposition, otherwise the grantor must be left to seek his remedy at law.<sup>95</sup> To one court it appears that if the grantee had no intention whatever of fulfilling his promise, this constitutes a sufficient measure of fraud to bring the case within the reach of a court of equity.<sup>96</sup> But another court is of the opinion that even such a fraudulent intention on the part of the grantee does not alter the rule that the grantor must pursue his remedy at law.<sup>97</sup> Still another view is that the remedy at law is not adequate if the grantee is insolvent or financially unable to pay any judgment which might be recovered against him for the value of the

<sup>93</sup> Long v. Long, 104 Ark. 562, 149 S. W. 662; Scott v. Scott, 3 B. Mon. (Ky.) 2; Cash v. Cash, 19 Ky. Law Rep. 686, 41 S. W. 579; Tomsik v. Tomsik, 78 Neb. 103, 110 N. W. 674; Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266; Fluharty v. Fluharty, 54 W. Va. 407, 46 S. E. 199; Mootz v. Petraschefski, 137 Wis. 315, 118 N. W. 865; Young v. Young, 157 Wis. 424, 147 N. W. 361.

<sup>94</sup> Gardner v. Knight, 124 Ala. 273, 27 South. 298; Lindsey v. Lindsey, 62 Ga. 546; Van Donge v. Van Donge, 23 Mich. 321; Murray v. King, 7 Ired. Eq. (42 N. C.) 19; Deveraux v. Cooper, 15 Vt. 88; Murkowski v. Murkowski, 61 Wash. 103, 112 Pac. 92.

<sup>95</sup> Burns v. Cavanaugh, 12 Montg. Co. Law Rep'r (Pa.) 101; Hale v. Witt, 1 Heisk. (Tenn.) 567.

<sup>96</sup> White v. White (Tex. Civ. App.) 95 S. W. 733. And see Chamberlin v. Sanders, 268 Ill. 41, 108 N. E. 666.

<sup>97</sup> Gardner v. Knight, 124 Ala. 273, 27 South. 298.

support which he promised and failed to render, and that if this can be shown, it will furnish ground for the intervention of equity.<sup>98</sup> But even this doctrine does not pass unchallenged, since there is at least one decision to the effect that a bill in equity is not sufficient which alleges the breach of the covenant for support coupled with the insolvency of the grantee, unless it also charges fraud or undue influence in the procuring of the deed.<sup>99</sup>

But elsewhere it is held that the grantor has his choice of remedies, and may either sue at law for the amount of the consideration (the value of the promised support and maintenance) as it becomes due, or treat the contract as void and sue in equity to cancel it.<sup>100</sup> In some states it is ruled that where a grantor executes a deed in consideration of future support, and there is a substantial failure of performance on the part of the grantee, the only remedy is to set aside the deed, since equity cannot compel the grantee to furnish the stipulated support and a court of law cannot make good with damages.<sup>101</sup> And even where the promise of the grantee is secured by a mortgage on the property transferred, it has been thought that the grantor was not limited to his remedy on the mortgage.<sup>102</sup> Still other authorities have sought a justification for the interference of equity in these cases in the theory that a conveyance in consideration of support and maintenance creates an implied trust, and when this is renounced by the grantee, equity may decree a reconveyance,<sup>103</sup> or in the theory that the grantee's refusal to comply with his contract raises a presumption of a fraudulent intention on his part, at the inception of the contract, not to perform.<sup>104</sup>

<sup>98</sup> *Priest v. Murphy*, 103 Ark. 464, 149 S. W. 98; *McCardle v. Kennedy*, 92 Ga. 198, 17 S. E. 1001, 44 Am. St. Rep. 85; *Thompson v. Lanfair*, 127 Ga. 557, 56 S. E. 770; *Wood v. Owen*, 133 Ga. 751, 66 S. E. 951.

<sup>99</sup> *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

<sup>100</sup> *Whittaker v. Trammell*, 86 Ark. 251, 110 S. W. 1041; *Priest v. Murphy* (Ark.) 144 S. W. 921.

<sup>101</sup> *Russell v. Robbins*, 247 Ill. 510, 93 N. E. 324, 139 Am. St. Rep. 342; *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17.

<sup>102</sup> *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

<sup>103</sup> *Grant v. Bell*, 26 R. I. 288, 58 Atl. 951.

<sup>104</sup> *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673, 101 Am. St. Rep.

Whatever may be the warrant for the intervention of a court of equity in these cases, it will not proceed to undo a settled arrangement unless convinced that there has been a real, substantial, and irremediable breach of the covenant for support. The rights and the just claims of the grantee are to be taken into account as well as those of the grantor. It is true that, ordinarily, where a person has parted with his property in consideration of an agreement for support for life, and discord thereafter arises between the parties, the courts are disposed to give the grantor the benefit of all reasonable doubt and restore the property to him if it can be done without manifest injustice to the grantee. But there is nothing illegal about such contracts, and they are not to be disregarded without good reason. And in the absence of fraud, where the grantee has abandoned another home or other employment to assume the responsibility, and has entered on and for a period of years has discharged the obligations of the contract with reasonable fidelity, he is not to be deprived of the benefit of his contract without legally sufficient cause.<sup>105</sup> Such cause exists where there is such a substantial failure to perform as would render the performance of the rest a thing different from that which was contracted for,<sup>106</sup> but such cause does not exist where the stipulated support and maintenance has been duly rendered, in a material sense, and the only complaint of the grantor is that he has become dissatisfied with the arrangement and considers that he has not been treated with proper kindness and courtesy.<sup>107</sup> There is sufficient reason for setting aside the conveyance when the grantee wholly repudiates his agreement, denies all conditions thereof, and refuses to perform any part,<sup>108</sup> or where he has failed to make good his promise for two years consecutively,<sup>109</sup> or where he has so materially failed to provide the grantor with proper food

243; *Spangler v. Yarborough*, 23 Okl. 806, 101 Pac. 1107, 138 Am. St. Rep. 856.

<sup>105</sup> *Lewis v. Wilcox*, 131 Iowa, 268, 108 N. W. 536.

<sup>106</sup> *Pittenger v. Pittenger*, 208 Ill. 582, 70 N. E. 699.

<sup>107</sup> *Brooks v. Richardson*, 144 Ky. 102, 137 S. W. 840; *Conner v. Marshall*, 11 Helsk. (Tenn.) 706.

<sup>108</sup> *Pinger v. Pinger*, 40 Minn. 417, 42 N. W. 289.

<sup>109</sup> *Shepardson v. Stevens*, 77 Mich. 256, 43 N. W. 918.

and clothing that the latter has become an object of commiseration to his neighbors.<sup>110</sup> So where the grantee disables himself from performing what he has promised, or by his own act makes performance impossible, equity will give relief,<sup>111</sup> but it cannot be said that performance has become impossible merely because the grantee has left the premises, or left the state, if proper provision has been made for carrying on his duty to the grantor by the hands of other persons,<sup>112</sup> or even because the grantee is dead, and that duty has descended upon his minor children.<sup>113</sup>

If a contract by one person to support another during his life is a continuing contract, it is also entire in its character, and a complete breach will justify rescission or cancellation. The grantee must offer the stipulated support and not wait to be asked for it,<sup>114</sup> and the grantor, when the contract has once been definitely broken, is neither obliged to renew it by making subsequent demands, nor to accept support afterwards tendered.<sup>115</sup> When suit has been begun for the cancellation of the deed, it is too late to offer to render the agreed support and maintenance and to give security for the performance of the obligation.<sup>116</sup>

Finally, it is to be observed that an arrangement of this kind may always be rescinded by the mutual agreement of the parties to it,<sup>117</sup> and that the grantor may be regarded as having rescinded, so as to release the grantee from further obligations, if, without any sufficient reason, he rejects the proffered support and betakes himself elsewhere,<sup>118</sup> or if, having sufficient cause of complaint, he elects to fall back upon his remedy at law, and seeks and obtains a judgment for damages against the grantee.<sup>119</sup>

<sup>110</sup> *Johnson v. Johnson* (Ky.) 125 S. W. 1097.

<sup>111</sup> *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458.

<sup>112</sup> *Davis v. Davis*, 135 Ga. 116, 69 S. E. 172; *McKenzle v. Duns-moor*, 114 Minn. 477, 131 N. W. 632.

<sup>113</sup> *Stebbins v. Petty*, 209 Ill. 291, 70 N. E. 673, 101 Am. St. Rep. 243.

<sup>114</sup> *Barnes v. Barnes*, 20 D. C. (9 Mackey) 479.

<sup>115</sup> *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74.

<sup>116</sup> *Fabrice v. Von Der Brelle*, 190 Ill. 460, 60 N. E. 835.

<sup>117</sup> *McDowell v. McDowell*, 24 Ky. Law Rep. 2270, 73 S. W. 1022.

<sup>118</sup> *Conner v. Marshall*, 11 Heisk. (Tenn.) 706.

<sup>119</sup> *Rowe v. Rowe*, 5 Ill. App. 331.

## CHAPTER VI

## INADEQUACY OF CONSIDERATION

- § 169. Right of Rescission in General.
- 170. Improvident Sales or Contracts.
- 171. Taking Unconscionable Advantage of Circumstances.
- 172. Inadequacy Combined with Fraud or Imposition.
- 173. Same; Duress; Undue Influence; Mental Weakness.
- 174. Catching Bargains and Sales of Expectancies and Remainders.
- 175. Gross Inadequacy Raising Presumption of Fraud.
- 176. Louisiana Law; Lesion Beyond Molety.

§ 169. Right of Rescission in General.—Inadequacy of consideration is not sufficient ground for the rescission of a contract or other obligation in equity, when standing alone, that is, unaccompanied by circumstances of fraud, imposition, undue influence, mental weakness, or the like.<sup>1</sup> It will be shown in a later section of this chapter that very great inadequacy of consideration (spoken of as “gross” or “shocking”) may raise a vehement presumption of fraud, and that relief may then be given in equity, not on the

<sup>1</sup> *Eyre v. Potter*, 15 How. 42, 14 L. Ed. 592; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; *Rhino v. Emery* (C. C.) 65 Fed. 826; *Waterman v. Waterman* (C. C.) 27 Fed. 827; *Stephenson v. Atlas Coal Co.*, 147 Ala. 432, 41 South. 301; *Peagler v. Stabler*, 91 Ala. 308, 9 South. 157; *Judge v. Wilkins*, 19 Ala. 765; *Stephenson v. Hawkins*, 67 Cal. 106, 7 Pac. 198; *White v. Walker*, 5 Fla. 478; *Chaires v. Brady*, 10 Fla. 133; *Hoyle v. Southern Saw Works*, 105 Ga. 123, 31 S. E. 137; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645; *Brown v. Budd*, 2 Ind. 442; *Wallaces v. Marshall*, 9 B. Mon. (Ky.) 148; *Lee v. Lee*, 2 Duv. (Ky.) 134; *Stewart v. State*, 2 Har. & G. (Md.) 114; *Hays v. Hollis*, 8 Gill (Md.) 357; *Holmes v. Fresh*, 9 Mo. 201; *Hanson v. Neal*, 215 Mo. 256, 114 S. W. 1073; *Powers v. Hale*, 25 N. H. 145; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Weber v. Weitling*, 18 N. J. Eq. 441; *Shotwell v. Shotwell*, 24 N. J. Eq. 378; *Leonard v. Southern Power Co.*, 155 N. C. 10, 70 S. E. 1061; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Knobb v. Lindsay*, 5 Ohio, 468; *Lewis v. Allen*, 42 Okl. 584, 142 Pac. 384; *In re Stevens*, 14 Wkly. Notes Cas. (Pa.) 488; *Whitefield v. McLeod*, 2 Bay (S. C.) 380, 1 Am. Dec. 650; *Coffee v. Ruffin*, 4 Cold. (Tenn.) 487; *White v. Flora*, 2 Overt. (Tenn.) 426; *Moore v. Lowery*, 27 Tex. 541; *Harrington v. Wells*, 12 Vt. 505; *Matthews v. Crockett*, 82 Va. 394; *Forde v. Herron*, 4 Munf. (Va.) 316; *Brachan v. Griffin*, 3 Call (Va.) 433.

ground of the inadequacy, but on the ground of the fraud. But taken by itself and in cases where it is not so extreme as to be revolting to a conscientious person, inadequacy of the consideration is not a ground on which a party to a contract can successfully invoke the aid of a court of equity. Thus, for instance, the fact that land is worth only one-half or one-third as much as a purchaser agreed to pay for it is not, standing alone, a sufficient reason in equity why he should be released from the performance of his contract.<sup>2</sup> Again, one who contracted to do public printing at rates less than those allowed by statute cannot repudiate the contract and recover the statutory rates, on the ground that a contract for performance for less than the lawful rate is without consideration or that the rate he agreed to accept is inadequate.<sup>3</sup> So where plaintiff and defendant entered into a contract to exchange property upon terms to be fixed by arbitrators appointed by the parties, it was held that the contract would not be set aside in favor of one party for inadequacy of consideration, neither the other party nor the arbitrators having been guilty of any fraud.<sup>4</sup> And mere inadequacy of consideration is not ground for relief to claimants under an outstanding unrecorded title, seeking to set aside a deed by their grantor of record to a subsequent purchaser.<sup>5</sup> These principles apply also to settlements and deeds of trust. Thus, a conveyance of realty by an aged husband and wife, in consideration that the grantee will care for them for the remainder of their lives, will not be set aside on the ground of fraud and undue influence in procuring it, where it appears that they fully understood the transaction, and the inadequacy of the consideration is the sole established fact calculated in any way to bring in question the fairness of the transaction.<sup>6</sup> The rule is likewise applicable in the case of public sales as well as private sales. For instance, a sale of land for delinquent taxes will not be

<sup>2</sup> *Peak v. Gore*, 94 Ky. 533, 23 S. W. 356; *Johnson v. Thornton*, 54 Iowa, 144, 6 N. W. 165.

<sup>3</sup> *Quigley v. Sumner County Com'rs*, 24 Kan. 293.

<sup>4</sup> *Kidder v. Chamberlin*, 41 Vt. 62.

<sup>5</sup> *Booker v. Booker*, 208 Ill. 520, 70 N. E. 709, 100 Am. St. Rep. 250.

<sup>6</sup> *Talbott's Devisees v. Hooser*, 12 Bush (Ky.) 408.



set aside for mere inadequacy of the price,<sup>7</sup> nor a sale under decree of court or other judicial sale.<sup>8</sup>

While, on the one hand, inadequacy of consideration may make a strong case for equitable relief when combined with circumstances showing fraud, trickery, or overreaching, yet, on the other hand, the rule against granting relief on this ground alone applies so much the more strongly when the evidence shows that the party complaining entered into the transaction deliberately and with a full appreciation of what he was doing, and expressed himself as satisfied with it.<sup>9</sup> And so also, where he knew that the transaction was highly speculative, and took what is sometimes called a "chancing bargain," balancing the chance of large profit against that of serious loss, he will not be heard to complain that he has not received an equivalent for what he gave.<sup>10</sup> For example, where a buyer who was competent to judge for himself bought a new invention, giving his notes for the price, the failure of the speculation does not entitle him to rescind the contract on the ground of inadequacy of consideration, especially where he acquiesced in it for a considerable time and paid one of the notes.<sup>11</sup> In a case in Wisconsin, the subject of the sale was an uncut diamond worth several hundred dollars. Neither party knew what it was, and it was sold for one dollar. It was held that the sale could not be set aside for the mere inadequacy of the price, there being no fraud practised.<sup>12</sup> But where a bill was filed to annul a sale of county school property, made by the county board of public instruction, on the ground that the price received was inadequate and the board violated their trust in not trying to get a better price, it was held that a decree should be given for the defendants,

<sup>7</sup> *Rothchild v. Rollinger*, 32 Wash. 307, 73 Pac. 367; *State v. Sargent*, 12 Mo. App. 229.

<sup>8</sup> See, *infra*, § 453.

<sup>9</sup> *Shepherd v. Turner*, 29 Ky. Law Rep. 1241, 97 S. W. 41.

<sup>10</sup> *Breckenridge v. Waters*, 5 T. B. Mon. (Ky.) 150, 17 Am. Dec. 46; *Dowdall v. Lenox*, 2 Edw. Ch. (N. Y.) 267.

<sup>11</sup> *Lowber v. Selden*, 11 How. Prac. (N. Y.) 526.

<sup>12</sup> *Wood v. Boynton*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

where the complainant failed to show that the price paid was not a fair market price.<sup>13</sup>

§ 170. **Improvident Sales or Contracts.**—It is not a sufficient reason for rescinding a contract that it has proved, or has become, more burdensome in its operation upon the complaining party than was anticipated. "If it be indeed unequal now, if it has become unconscionable, that might possibly be a reason why a court should refuse to decree its specific performance, but it has nothing to do with the question whether it should be ordered to be canceled. It is not the province of a court of equity to undo a bargain because it is hard."<sup>14</sup> Hence it is a general rule that if a party enters into a contract or any other legal transaction with sufficient mental capacity to understand it, and not under the influence of fraud, coercion, or imposition, the courts will not relieve him of the consequences of his act on the sole ground that the bargain is, as to him, improvident, rash, foolish, or oppressive.<sup>15</sup> In other words, where a bill in equity is brought for relief against a sale (or other contract) if there are no suspicious circumstances connected with the transaction, and nothing in the relations of the

<sup>13</sup> *Special Tax School Dist. v. Dade County Board of Public Instruction*, 61 Fla. 798, 54 South. 265.

<sup>14</sup> *Marble Co. v. Ripley*, 10 Wall. 339, 356, 19 L. Ed. 955.

<sup>15</sup> *Martinez v. Moll* (C. C.) 46 Fed. 724; *Sheldon v. Birmingham Building & Loan Ass'n*, 121 Ala. 278, 25 South. 820; *Sellers v. Knight*, 185 Ala. 96, 64 South. 329; *Capital Security Co. v. Holland*, 6 Ala. App. 197, 60 South. 495; *Town of Southington v. Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023, 13 Ann. Cas. 411; *Wiest v. Garman*, 3 Del. Ch. 422; *Stephens v. Orman*, 10 Fla. 9; *Mitchell v. Mason*, 65 Fla. 208, 61 South. 579; *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177; *Ross v. Gimball*, T. U. P. Charlt. (Ga.) 268, 4 Am. Dec. 711; *Federal Life Ins. Co. v. Griffin*, 173 Ill. App. 5; *Mechanics' & Traders' Savings, Loan & Building Ass'n v. Vierling*, 66 Ill. App. 621; *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474; *Goodwin v. White*, 59 Md. 503; *Bowker v. Torrey*, 211 Mass. 282, 97 N. E. 770; *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 46 South. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540; *Jones v. Stewart*, 62 Neb. 207, 87 N. W. 12; *Holland v. John*, 60 N. J. Eq. 435, 46 Atl. 172; *Coster v. Griswold*, 4 Edw. Ch. (N. Y.) 364; *Green v. Thompson*, 37 N. C. 365; *Hunter v. Goudy*, 1 Ohio, 449; *Powers v. Powers*, 46 Or. 479, 80 Pac. 1058; *Graham v. Pancoast*, 30 Pa. 89; *Kester v. Bahr*, 1 Kulp (Pa.) 262. But compare *McKnatt v. McKnatt* (Del. Ch.) 93 Atl. 367.

parties which renders it inequitable for the purchaser to retain his bargain, it is not enough to induce a court of equity to interfere that the bargain was improvident on the one side, or hard and unreasonable on the other side, or the price inadequate.<sup>16</sup> "The value of a thing is what it will produce, and it admits of no precise standard. One man may sell his property for less than another would. He may sell under the pressure of circumstances which may make a smaller price more beneficial than a greater would have been under different circumstances. If courts of equity were to unravel all these transactions, they would throw everything into confusion and set afloat the contracts of mankind."<sup>17</sup> In another case it was said: "We are clearly of the opinion that the plaintiffs failed to establish the allegations in the complaint and make a case warranting a decree of rescission. There can be no doubt that the plaintiffs paid more than the value of the property (if the evidence is reliable), and the transaction may be financially disastrous, but courts cannot relieve against the carelessness, inattention, or self-deception of parties. A failure in a speculation does not constitute ground for relief."<sup>18</sup> The courts are not authorized to declare a contract void because it may be foolish,<sup>19</sup> and a person who, with his eyes open, purchases property for a sum greatly exceeding its value, cannot obtain relief in equity on that account.<sup>20</sup>

While anything like fraud, when added to inadequacy of consideration, will give the injured party a claim to the favorable attention of equity, yet when parties deal with each other at arms' length in business transactions, courts will not relieve against improvident contracts though they were induced by arts and tricks of trade.<sup>21</sup> And for even stronger reasons, the fact that a party made a hard or losing bargain will be no ground for setting aside the contract, when he entered into the transaction intelligently, advised

<sup>16</sup> *Dunn v. Chambers*, 4 Barb. (N. Y.) 376.

<sup>17</sup> *Griffith v. Spratley*, 1 Cox, 383.

<sup>18</sup> *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827.

<sup>19</sup> *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177.

<sup>20</sup> *Marshall v. Billingsly*, 7 Ind. 250.

<sup>21</sup> *Storthz v. Crusoe*, 88 Ark. 615, 113 S. W. 1015.

with others, and had an opportunity to withdraw after consulting counsel.<sup>22</sup> Thus, where a party to a deed has mental capacity to make it, and there is no fraud or undue influence moving him to the act, the deed cannot be impeached because the sale was imprudent, unreasonable, or unequal.<sup>23</sup> And the same principle applies to the revocation of a trust or settlement of property. When a deed of this kind is voluntarily made, and not under coercion or the exercise of an undue influence, it will not be set aside on the sole ground of its having been improvident or unwise, unless it is shown that it was the act of a person whose mental powers were so enfeebled that he did not understand the effect of the instrument, or unless some other recognized ground for equitable interference appears in the case.<sup>24</sup>

**§ 171. Taking Unconscionable Advantage of Circumstances.**—Extortion is repugnant to equity, and when it appears that an oppressive bargain, or one founded on a greatly inadequate consideration, has been obtained from a party by taking an unconscientious advantage of circumstances which made it peculiarly difficult for him adequately to safeguard his own interests, equity will be moved to give him relief by way of rescission or cancellation of his deed.<sup>25</sup> It has been said: "Where the inadequacy of price is so great that the mind revolts at it, the court will lay hold on the slightest circumstances of oppression or advantage to rescind the contract. So when a person borrowing money to relieve his necessities is induced to purchase property at an exorbitant price, and to an amount greatly beyond the

<sup>22</sup> *Thurman v. Ellnor*, 82 Ark. 603, 101 S. W. 1154; *Bowers v. Ralitt*, 94 Neb. 567, 143 N. W. 802.

<sup>23</sup> *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Cox v. Combs*, 51 Tex. Civ. App. 346, 111 S. W. 1069; *Coblentz v. Putifer*, 87 Kan. 719, 125 Pac. 30, 42 L. R. A. (N. S.) 298.

<sup>24</sup> *Fretz v. Roth*, 70 N. J. Eq. 764, 64 Atl. 152; *Fidelity Title & Trust Co. v. Weitzel*, 152 Pa. 498, 25 Atl. 569; *McElroy v. Masterson*, 156 Fed. 36, 84 C. C. A. 202.

<sup>25</sup> *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Bridgewater v. Byassee*, 29 Ky. Law Rep. 377, 93 S. W. 35; *Hannibal & St. J. R. Co. v. Brown*, 43 Mo. 294; *McKinney v. Pinckard's Ex'r*, 2 Leigh (Va.) 149, 21 Am. Dec. 601; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799. Compare *Schields v. Hickey*, 26 Mo. App. 194; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17.

loan obtained, and secure the payment by mortgage on his other lands, the necessity of the purchaser, connected with the exorbitancy of price, is sufficient evidence of unfair advantage to justify the interference of the court."<sup>26</sup> Whatever may be the circumstances which brought it about, when the losing party was placed in a peculiarly unfortunate or helpless position, so that a man of rectitude and good conscience would have refrained from seizing the advantage which that condition gave him, it will be a suitable occasion for a court of equity to give relief.<sup>27</sup> Pecuniary embarrassment places any man at a disadvantage, and when the stress of his financial needs is so great as to put him practically at the mercy of any one with whom he bargains, equity will not sustain a transaction which is grossly oppressive as to him, and which shows an unconscientious advantage taken of his helpless situation.<sup>28</sup> And this is peculiarly true where the injured party was also under strong influence exerted by the other, or was naturally improvident or reckless, inexperienced, or dissipated.<sup>29</sup> At the same time, the law does not encourage folly nor discountenance business acumen. The inadequacy of consideration in a case of this kind must be gross, in order to move a court to interfere. A sale of property for less than its apparent value will not be set aside because made reluctantly and when the seller was greatly in want of money, if there was nothing unusual or oppressive in the sale, and there was no fraudulent advantage taken or imposition.<sup>30</sup>

But financial embarrassment is not the only circumstance which may place one in a position where he needs the protection of a court of equity against unscrupulous persons dealing with him. Thus, in a case in Kentucky, a contract made with a widow, immediately after the death of her husband, by which, for a small consideration, she relin-

<sup>26</sup> *Hough's Adm'rs v. Hunt*, 2 Ohio, 495, 15 Am. Dec. 569; *Musselman v. Knott*, 7 Ky. Law Rep. 380.

<sup>27</sup> *Esham v. Lamar*, 10 B. Mon. (Ky.) 43.

<sup>28</sup> *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852; *Marshall v. Billingsly*, 7 Ind. 250; *Bradley v. Bradley*, 28 Ky. Law Rep. 1261, 91 S. W. 1143. But see *Greeno v. Ellas*, 1 Tenn. Ch. App. 165.

<sup>29</sup> *Marshall v. Billingsly*, 7 Ind. 250.

<sup>30</sup> *Sammis v. Matthews*, 19 Fla. 811.

quished a large amount of property devised to her by her husband, was held to be inequitable and was canceled.<sup>81</sup> And generally, it is a case for equitable relief where the relative situation of the parties is so unequal as to give to one of them the opportunity of making his own terms.<sup>82</sup> When a person of weak understanding makes an unconscionable bargain with one of strong mind, the natural inference is that it has been obtained by the power of the strong over the weak, and it may therefore be set aside.<sup>83</sup> Cases not infrequently arise in which the grantor of property is a young man without experience in business affairs, and with a naturally unsound judgment, perhaps a spendthrift, perhaps dissipated and with mental powers enfeebled by his habits of intoxication, while the other party to the contract is an experienced business man, sagacious and shrewd, and well aware of the circumstances which give him the advantage in any transaction between them. If, in such a situation as this, a transfer of property is effected for a greatly inadequate consideration, equity will not hesitate to set it aside.<sup>84</sup> On a similar principle, if, in a contract of sale, the seller names a consideration that is out of all proportion to the value of the subject-matter, and the purchaser, realizing that a mistake must have been committed, takes advantage of it, and refuses to let the mistake be corrected when it is discovered, he cannot properly claim that there is an enforceable contract.<sup>85</sup>

These rules apply to the lending of money at unconscionable rates of interest. Without regard to the statutes against usury, a court of equity will refuse to enforce a contract calling for the payment of interest at an exorbitant rate, especially if there are any circumstances of oppression on the one side and weakness on the other, or any undue influence exerted, such a transaction being so contrary to

<sup>81</sup> *Stewart v. Stewart*, 7 J. J. Marsh. (Ky.) 183, 23 Am. Dec. 396.

<sup>82</sup> *Potter v. Everitt*, 42 N. C. 152.

<sup>83</sup> *Boarman's Committee v. Gardner*, 7 Ky. Law Rep. 521; *Stringfellow v. Hanson*, 25 Utah, 480, 71 Pac. 1052.

<sup>84</sup> *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *McCormick v. Malin*, 5 Blackf. (Ind.) 509.

<sup>85</sup> *Cunningham Mfg. Co. v. Rotograph Co.*, 30 App. D. C. 524, 15 L. R. A. (N. S.) 368, 13 Ann. Cas. 1147.

good conscience as to be presumptively fraudulent.<sup>86</sup> In one of the cases, the court set aside a series of deeds which charged sums, advanced by a money lender at exorbitant interest, on the borrower's estates, which were ample security, and which deeds contained unusual and oppressive clauses, such as authorizing a sale without notice, and empowering the lender to pay off existing charges, carrying interest at six per cent, and to charge twenty per cent thereon, it appearing to the court that these harsh provisions were inserted by the fraud and deceit of the money lender without the knowledge of the borrower, the latter being unprotected by proper professional advice.<sup>87</sup> Finally it is said that a court of equity will not relieve a vendee from a forfeiture on failure to make one of the payments of the purchase price of land, where the effect of such relief would be to enforce a hard and unconscionable bargain, or where the consideration to be paid by the vendee is grossly inadequate.<sup>88</sup>

**§ 172. Inadequacy Combined with Fraud or Imposition.** It is generally true that mere inadequacy in the price or consideration of a contract, unaccompanied by other inequitable circumstances, is not in itself a sufficient ground for canceling a contract or conveyance. And if the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity will not interfere. Yet where the accompanying incidents are inequitable and show bad faith, such as misrepresentation, concealment, undue advantage taken of ignorance or misplaced confidence, or the like, such circumstances, combined with great inadequacy of price or consideration, may easily induce a court to grant affirmative relief by decreeing a rescission or cancellation, or at the least by throwing the burden of proof up-

<sup>86</sup> *Sime v. Norris*, 8 Phila. (Pa.) 84; *Howley v. Cook*, 8 Ir. Eq. 571; *Aylesford v. Morris*, L. R. 8 Ch. App. 484; *Moore v. McKay*, 1 Beatty Ch. 282; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Culbertson v. Lennon*, 4 Minn. 51 (Gil. 26); *Banker v. Brent*, 4 Minn. 521 (Gil. 408); *Bidwell v. Whitney*, 4 Minn. 76 (Gil. 45).

<sup>87</sup> *Howley v. Cook*, 8 Ir. Eq. 571.

<sup>88</sup> *Missouri River, Ft. S. & G. R. Co. v. Brickley*, 21 Kan. 275.



on the party seeking to enforce or claim the benefit of the transaction, to show that the other acted voluntarily, deliberately, and with full knowledge of the nature and effects of his acts, even though such circumstances would not constitute an absolute and necessary ground for equitable interposition.<sup>39</sup> As otherwise expressed, it may be said that while inadequacy of consideration is not of itself generally sufficient to avoid an executed conveyance, yet it should always induce a close scrutiny of the circumstances attending the transaction.<sup>40</sup> Thus, great inadequacy of consideration will justify the granting of relief by a court of equity, where it further appears that the grantor in a conveyance had no knowledge of the nature and value of the property which he was conveying away, while the grantee had full knowledge of these facts, and neglected his duty to inform the grantor,<sup>41</sup> or that an ignorant man was tricked into parting with his property at very much less than its real value,<sup>42</sup> or that the grantor could not read or speak the English language, did not understand the contract, and did not know that it was a conveyance of his property,<sup>43</sup> or that the party claiming under the contract or seeking to benefit by it made false representations as to value with intent to secure the property for an inadequate price,<sup>44</sup> or that, having undertaken to explain the circumstances, he failed to make a full disclosure of the material facts,<sup>45</sup> or procured a deed for an insignificant consideration by making use of both misrepresentations and fraudulent concealments.<sup>46</sup> In one of the cases on this point, one who was a director and the active manager of a corporation and who owned most of its stock

<sup>39</sup> *Storthz v. Williams*, 86 Ark. 460, 111 S. W. 804; *Derby v. Donahoe*, 208 Mo. 684, 106 S. W. 632; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Flanigan v. Skelly*, 89 App. Div. 108, 85 N. Y. Supp. 4; *Reed v. Rudman*, 5 Ind. 409; *Kirby v. Arnold* (Ala.) 68 South. 17; *McPhaul v. Walters*, 167 N. O. 182, 83 S. E. 321.

<sup>40</sup> *McHarry v. Irvin's Ex'r*, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800.

<sup>41</sup> *Tribou v. Tribou*, 96 Me. 305, 52 Atl. 795.

<sup>42</sup> *Woodard v. Fitzpatrick*, 9 Dana (Ky.) 117.

<sup>43</sup> *Shea v. Teufert*, 207 Ill. 222, 69 N. E. 872.

<sup>44</sup> *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753.

<sup>45</sup> *Smith v. Woodson*, 29 Ky. Law Rep. 316, 92 S. W. 980.

<sup>46</sup> *Armstrong v. Randall*, 93 Neb. 722, 141 N. W. 829.

alarmed a fellow director, who owned most of the remaining stock, by false statements as to the financial condition of the company, with intent to induce him to part with his holdings at a grossly inadequate price, and procured from him a contract to sell for such price, payable partly in cash, partly in notes made or indorsed by the managing director, and partly in stock of a corporation organized by the latter for the purpose of acquiring the assets of the other company. The contract also constituted the manager attorney in fact to carry out the transaction, and in consummating the contract he secretly took title to the stock himself. It was held that these facts showed such a case of fraud and deceit as to entitle the seller to relief against the buyer, aside from any question as to the relations between the parties at the time of the transaction.<sup>47</sup>

Persons who occupy a position of trust or confidence towards others are held in equity to a very strict measure of candor and integrity in their dealings with them, and if property passes between them for a markedly inadequate price, it is regarded as a highly suspicious circumstance and one which will justify a very severe scrutiny of all the attending circumstances. And if, in addition to the inadequacy of consideration, it shall be found that there has been any fraud or misrepresentation, or any advantage taken of the trust and confidence reposed, equity will not hesitate to give relief.<sup>48</sup> But in other cases, the fact that the expressed consideration in a deed is one dollar will not cast a suspicion of fraud upon the transaction, since the true consideration may be shown by parol.<sup>49</sup> And it should be remembered that a person has no claim to the favorable consideration of a court of equity who acted deliberately and intelligently in the transaction complained of, and was active in bringing it about, and urged it upon the other par-

<sup>47</sup> *George v. Ford*, 36 App. D. C. 315.

<sup>48</sup> *Coffee v. Ruffin*, 4 Cold. (Tenn.) 487; *Davis v. Yancy*, 31 Ky. Law Rep. 1155, 104 S. W. 697. But a sale will not be set aside for fraud merely because the purchaser got the best of the bargain, and the seller was his grandmother. *Cornish v. Johns*, 74 Ark. 231, 85 S. W. 764.

<sup>49</sup> *Van Sickle v. Harmeyer*, 172 Ill. App. 218.

ty, although, from poor judgment or lack of information, he failed to secure an adequate price.<sup>50</sup>

§ 173. **Same; Duress; Undue Influence; Mental Weakness.**—Inadequacy of consideration, when coupled with circumstances which show that the party complaining was acting under duress, oppression, or at the command of the other, will be regarded as a fraud upon him and will entitle him to relief in equity.<sup>51</sup> But the duress must be exerted by, or originate with, the party seeking to benefit by the contract. For instance, a person who is under arrest on a criminal charge, and who gives an extravagantly high consideration to another to bail him out, cannot ordinarily be released from his bargain without some proof of fraud or imposition other than that arising merely from his situation.<sup>52</sup> Subject to this qualification, duress sufficient to avoid a contract, when combined with inadequacy of consideration, may consist in the use of threats, when the relative situation of the parties is such that they would be likely to have great weight or to inspire real fear.<sup>53</sup> For similar reasons, the fact that a contract or a transfer of property was extorted from a person by the exercise of a sinister and controlling influence over him by another, together with the fact of the inadequacy of the consideration given, will justify the interference of a court of equity.<sup>54</sup> Such influence may arise from youth and inexperience on the one side and the exercise of parental authority on the other,<sup>55</sup> or simply from the ascendancy of an active and dominant mind over ignorance, trust, and dependence.<sup>56</sup>

It is also a rule that a conveyance or transfer of property, made by a person mentally weak, or of such feeble intelligence that he is incompetent to transact any business requiring good judgment and forethought, though perhaps

<sup>50</sup> *Kirschner v. Kirschner*, 113 Mo. 290, 20 S. W. 791.

<sup>51</sup> *Holmes v. Fresh*, 9 Mo. 201.

<sup>52</sup> *Knobb v. Lindsay*, 5 Ohio, 468.

<sup>53</sup> *Walker v. Shepard*, 210 Ill. 100, 71 N. E. 422; *Wickland v. Wickland*, 19 Cal. App. 559, 126 Pac. 507.

<sup>54</sup> *Hart v. Hart*, 57 N. J. Eq. 543, 42 Atl. 153; *Curtice v. Dixon*, 74 N. H. 386, 68 Atl. 587; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.

<sup>55</sup> *Colle v. Hudgins*, 109 Tenn. 217, 70 S. W. 56.

<sup>56</sup> *George v. Richardson*, Gilmer (Va.) 230.

not entirely insane, and which was procured by taking advantage of such mental weakness, and is founded upon a grossly inadequate consideration, will be regarded as fraudulent, and will be vacated or canceled upon equitable terms.<sup>57</sup> To say the very least, circumstances such as these will raise a strong suspicion, and will cast upon the party against whom relief is demanded the burden of proving that the transaction was entirely fair.<sup>58</sup> Nor is it necessary that the mental weakness of the party defrauded should be of a permanent or totally disabling character. Relief has been given in a case where the injured party was rendered temporarily incapable of managing his business by an attack of nervous prostration,<sup>59</sup> and where he was at the time under the influence of alcoholic intoxication.<sup>60</sup>

In one state it is provided by law that great inadequacy of consideration, joined with great disparity of mental ability, may justify setting aside a contract; and under this rule, a deed may be vacated for such cause without proof of fraud or the exercise of undue influence.<sup>61</sup> And independently of such statutory enactments, it has been held that where a treaty respecting important interests is conducted between two persons of unequal powers, one having a naturally unsound judgment, rendered still weaker by a long-continued habit of intoxication, and the other enterprising, keen, and sagacious in business, and where the weaker mind trusts the stronger, and that influence is increased by pecuniary embarrassment on the one side and wealth on the other, and results in the contract exhibiting great inadequacy of consideration, it is a case where equity

<sup>57</sup> Walling v. Thomas, 133 Ala. 426, 31 South. 982; Clark v. Lopez, 75 Miss. 932, 23 South. 648, 957; Cadwallader v. West, 48 Mo. 483; Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; Buffalow v. Buffalow, 22 N. C. 241; Hoeh v. Hoeh, 197 Pa. 387, 47 Atl. 351; Kester v. Bahr, 1 Kulp (Pa.) 262. See Doughty v. Doughty, 7 N. J. Eq. 643; Grimminger v. Alderton (N. J. Ch.) 96 Atl. 80.

<sup>58</sup> Goodbar v. Lidikey, 136 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 296; Yount v. Yount, 144 Ind. 133, 43 N. E. 136.

<sup>59</sup> Ashby v. Yetter, 79 N. J. Eq. 196, 81 Atl. 730.

<sup>60</sup> Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584. And see, *infra*, §§ 277-281.

<sup>61</sup> Pye v. Pye, 133 Ga. 246, 65 S. E. 424.

may justly interfere.<sup>62</sup> But it does not follow that a person is incapable of protecting his interests and acting intelligently in business matters merely because he is far advanced in years; and if such a person makes a bargain which is not so manifestly unfair as to show that he was deceived or imposed upon, equity will not set it aside.<sup>63</sup> This is also the rule where the mind of one of the parties appears to have been somewhat impaired by sickness, but no very great inadequacy of consideration is shown.<sup>64</sup> And if the grantor in a conveyance was a person of sound mind and at least average ability, and was not constrained by duress or undue influence, nor tricked by fraud, inadequacy of the consideration alone is not sufficient ground for relief in equity.<sup>65</sup>

**§ 174. Catching Bargains and Sales of Expectancies and Remainders.**—A catching bargain is a bargain by which money is loaned, at an extortionate or extravagant rate, to an heir or to any one who has an estate in reversion or expectancy, to be repaid upon the vesting of his interest, or a similar unconscionable bargain with such person for the purchase outright of his expectancy. It is “such a contract as, on the one hand, no man in his right senses and not under a delusion would make, and, on the other hand, no fair and honest man would accept.”<sup>66</sup> And according to the English decisions, this is the one instance where inadequacy of consideration alone may warrant the rescission of a contract or justify a court of equity in setting it aside. No actual fraud need be proved in such a case, nor duress or undue influence. Fraud is always presumed or inferred as a matter of law from the unconscionable nature of the bargain, the extravagant rate of interest or return to the lender or buyer, the financial straits or necessity of the borrower or seller, or the ruinous circumstances which drive him to

<sup>62</sup> *McCormick v. Mahn*, 5 Blackf. (Ind.) 509.

<sup>63</sup> *Green v. Thompson*, 37 N. C. 365.

<sup>64</sup> *Sprague v. Duel*, 11 Paige (N. Y.) 480.

<sup>65</sup> *Wilson v. Wilson*, 160 Mich. 555, 125 N. W. 385; *Marking v. Marking*, 106 Wis. 292, 82 N. W. 133.

<sup>66</sup> *Earl of Chesterfield v. Janssen*, 2 Ves. 125, 155; *King v. Cohorn*, 6 Yerg. (Tenn.) 75, 27 Am. Dec. 455.

such extremities, or, generally, from any and all facts which emphasize the inequality of the parties and force the mind to the conclusion that such a bargain could not have been effected save by deceit, gross imposition, or extortion. Hence the burden of proof is on the purchaser or lender to show clearly that the transaction was fair and just and founded upon a consideration at least not strikingly inadequate.<sup>67</sup> "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances and conditions of the parties."<sup>68</sup>

In one of the cases on this subject it was said: "The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, etc., against which relief is always extended. These have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting,—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain.

\* \* \* In most of these cases have occurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand."<sup>69</sup> But it is to be observed that relief is afforded in equity to victims of catching bargains not on the ground of their youth and inexperience, but on account of the other circumstances in such cases

<sup>67</sup> *Shelly v. Nash*, 3 Madd. 232; *Peacock v. Evans*, 16 Ves. 512; *Foster v. Roberts*, 29 Beav. 467; *Bowes v. Heaps*, 3 Ves. & B. 117; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484.

<sup>68</sup> *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 484, 490.

<sup>69</sup> *Earl of Chesterfield v. Janssen*, 2 Ves. 125, 156.

which raise the vehement presumption of fraud. Hence it is no defense to a proceeding to set aside such a transaction that the vendor or borrower was a person of mature years and perfectly capable of understanding the entire transaction and weighing its probable consequences.<sup>70</sup> And although the presumption of fraud is heightened by the fact that the negotiations and the contract are kept a secret from the family, friends, or advisers of the victim, who might be supposed to have extricated him from his financial difficulties or at least to have protected him from imposition, if they had known of it, yet, on the other hand, the fact that they were fully apprised of the whole transaction is not of itself sufficient to prevent the granting of relief in equity.<sup>71</sup> But if the lender or purchaser shows that the transaction was fair and reasonable, and the consideration adequate, a court of equity will not set it aside unless actual fraud is shown.<sup>72</sup> And there is no presumption of fraud in these cases where the sale of the reversion or expectancy was made at auction, for the presumption is then that it brought a fair and adequate price.<sup>73</sup>

Some of the earlier American cases adopted this rule of the English courts in its fullest extent. Thus, in a case in New York, it was said: "Dealing with younger heirs and for reversionary interests is also watched with the utmost jealousy, and constitutes a particular class of cases forming another exception to the general rule that, for mere inadequacy of price, a contract is not to be set aside."<sup>74</sup> But these views have not been generally adopted. According to the preponderance of authority in the United States, a bargain with an heir or expectant must be shown to be fraudulent, or to have been extorted by duress, imposition, or un-

<sup>70</sup> *Davis v. Duke of Marlborough*, 2 Swanst. 108; *Bromley v. Smith*, 26 Beav. 644; *Tynte v. Hodge*, 2 Hem. & Mil. 287; *Earl of Portmore v. Taylor*, 4 Sim. 182.

<sup>71</sup> See *Talbot v. Staniford*, 1 Johns. & Hem. 484; *Earl of Aylesford v. Morris*, L. R. 8 Ch. App. 491.

<sup>72</sup> *Wharton v. May*, 5 Ves. 27; *Bacon v. Bonham*, 33 N. J. Eq. 614; *Fitch v. Fitch*, 8 Pick. (Mass.) 480; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258.

<sup>73</sup> *Shelly v. Nash*, 3 Madd. 232.

<sup>74</sup> *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 25, 7 Am. Dec. 513.



due influence, or something more must be shown than the mere inadequacy of consideration, before equity will be moved to set it aside.<sup>75</sup> But relief has been given in cases where, besides the inadequacy of price, it was shown that the grantor was young and inexperienced, of weak mind and easily influenced, and was also defrauded in the particular bargain,<sup>76</sup> or that he was in needy circumstances and ignorant of the value of his property, and was advised and urged by the grantee, who possessed superior knowledge,<sup>77</sup> or that an unconscientious advantage was taken of the improvidence and distress of the seller,<sup>78</sup> or that he was a young and dissolute spendthrift and was grossly cheated.<sup>79</sup> In a case in New York, an action was brought to set aside, on the ground of fraud, a deed from plaintiff to defendant conveying a remainder limited after a life estate. It appeared that the plaintiff had just passed his twenty-first year, and that the price paid was not more than one-third the value of the remainder and probably less, but there was no other evidence of fraud than the inadequacy of the consideration. It was held that, while the plaintiff was entitled to relief, yet, as the proof of actual fraud was not clear, the deed would be allowed to stand as security for the sum actually advanced by the defendant.<sup>80</sup>

§ 175. **Gross Inadequacy Raising Presumption of Fraud.** Equity may decree the rescission or cancellation of a contract or conveyance where such a gross inadequacy of consideration is shown as to shock the conscience, because in this case the disparity between the value of the subject and the consideration given for it is regarded as raising an irrefragable presumption of fraud, or (according to most of the authorities) as constituting in itself conclusive evidence

<sup>75</sup> *McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240; *Cribbins v. Markwood*, 13 Grat. (Va.) 495, 67 Am. Dec. 775; *Varick v. Edwards*, 1 Hoff. Ch. (N. Y.) 382; *Mastin v. Marlow*, 65 N. C. 695.

<sup>76</sup> *Jones v. Galbraith* (Tenn. Ch. App.) 59 S. W. 350.

<sup>77</sup> *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125, 12 Am. Dec. 362.

<sup>78</sup> *McKinney v. Pinckard's Ex'r*, 2 Leigh (Va.) 149, 21 Am. Dec. 601.

<sup>79</sup> *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711.

<sup>80</sup> *Friedman v. Hirsch*, 63 Hun, 630, 18 N. Y. Supp. 85, 87.

of fraud.<sup>81</sup> But the inadequacy must be gross. It is not sufficient to show that one of the parties got the best of the other in a bargain or trade.<sup>82</sup> There must be "such a shocking inadequacy of consideration that the court may presume fraud,"<sup>83</sup> or the inequality must be "so gross and palpable as to shock the conscience and convince the judgment."<sup>84</sup> It is of course impossible to lay down any exact measure by which to determine whether or not the inadequacy of consideration shown in the particular case is shocking. Each case must be judged on its own facts. But by way of illustration it may be stated that the sale of an annuity worth over \$20,000 for less than \$2,700 has been set aside as unconscionable,<sup>85</sup> and the same is true of cases where only \$5 was paid for a tract of land estimated to be worth \$1,800 or more,<sup>86</sup> and where \$5 was given for property worth \$1,000, the seller being an ignorant old man,<sup>87</sup> or where the value of the land sold was shown to be five times greater than the

<sup>81</sup> *Ballentyne v. Smith*, 205 U. S. 285, 27 Sup. Ct. 527, 51 L. Ed. 803; *In re Throckmorton*, 149 Fed. 145, 79 C. C. A. 15; *Smith v. Collins*, 148 Ala. 672, 41 South. 825; *Cofer v. Moore*, 87 Ala. 705, 6 South. 306; *Saltonstall v. Gordon*, 33 Ala. 149; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Hoyle v. Southern Saw Works*, 105 Ga. 123, 31 S. E. 137; *Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs*, 12 Kan. 482; *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23; *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; *Hays v. Hollis*, 8 Gill (Md.) 357; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *German Corporation of Negaunee v. Negaunee German Aid Society*, 172 Mich. 650, 138 N. W. 343; *Newman v. Meek*, Freem. Ch. (Miss.) 441; *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9; *Smith v. Duffy*, 1 How. Prac. N. S. (N. Y.) 340; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Bruner v. Cobb*, 37 Okl. 228, 131 Pac. 165; *Barker v. Wiseman* (Okl.) 151 Pac. 1047; *Sherman v. Glick*, 71 Or. 451, 142 Pac. 606; *Coffee v. Ruffin*, 4 Cold. (Tenn.) 487; *Deaderick v. Watkins*, 8 Humph. (Tenn.) 520; *Hardeman v. Burge*, 10 Yerg. (Tenn.) 202; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154; *Howard v. Edgell*, 17 Vt. 9; *Hale v. Wilkinson*, 21 Grat. (Va.) 75; *Risch v. Von Lillienthal*, 34 Wis. 250; *Peacock v. Evans*, 16 Ves. 517; *Gwynne v. Heaton*, 1 Bro. C. C. 9. Contra, see *Carman v. Page*, 59 N. C. 37.

<sup>82</sup> *Van Gundy v. Steele*, 261 Ill. 206, 103 N. E. 754.

<sup>83</sup> *Fairchild v. Dement* (C. C.) 164 Fed. 200.

<sup>84</sup> *McArtee v. Engart*, 13 Ill. 242.

<sup>85</sup> *Roux v. Rothschild*, 78 App. Div. 637, 79 N. Y. Supp. 1145.

<sup>86</sup> *Henderson v. Sublett*, 21 Ala. 626.

<sup>87</sup> *Stephens v. Ozbourne*, 107 Tenn. 572, 64 S. W. 902, 89 Am. St. Rep. 957.

purchase price paid,<sup>88</sup> and where property worth \$2,000 was transferred for \$500 to a stranger, to the exclusion of the grantor's natural heirs.<sup>89</sup> In another case, the plaintiff gave a written contract permitting a power company to go upon his land, and to construct and maintain steel towers carrying electric wires, with the right to enter for the purposes of inspection and repairs, and to cut away trees and clear obstructions to the line, for the consideration of one dollar for each tower, and it was held that the consideration was so grossly inadequate as to justify a submission of the question of fraud to the jury.<sup>90</sup> But on the other hand, a price of \$450 for land worth \$800 is not so shockingly disproportionate to its value as to call for the interposition of equity,<sup>91</sup> and though land worth \$13,000 was taken in satisfaction of a mortgage which, with accumulated interest, amounted to \$8,000, this was regarded as not such inadequacy of price as to raise a presumption of fraud.<sup>92</sup> And further, it is important to notice that, in order to determine whether a consideration given was so grossly inadequate as to amount to proof of fraud, the court must look at the facts as they existed at the time the contract was made, and not at the time when application for relief is made.<sup>93</sup> Thus, an allegation that land was sold by one of the parties to the other for a certain named price, and that soon afterwards it was sold for more than eight times that amount, is not a sufficient averment of inadequacy of consideration.<sup>94</sup> And again, the smallness of the price paid is not necessarily an evidence of fraud in the case of a risky or speculative purchase. In a case in West Virginia, it appeared that the defendant had induced the plaintiff to sell to him all her interest in certain land which had formerly belonged to her, and which she and her husband had conveyed to third persons who were then in possession. The land was actually worth about

<sup>88</sup> *Turner's Trustee v. Washburn*, 25 Ky. Law Rep. 2198, 80 S. W. 460.

<sup>89</sup> *Johnson v. Woodworth*, 134 App. Div. 715, 119 N. Y. Supp. 146.

<sup>90</sup> *Leonard v. Southern Power Co.*, 155 N. C. 10, 70 S. E. 1061.

<sup>91</sup> *Storthez v. Arnold*, 74 Ark. 68, 84 S. W. 1036.

<sup>92</sup> *Talbott v. Manard*, 108 Tenn. 60, 59 S. W. 340.

<sup>93</sup> *Steinfeld v. Nielsen*, 12 Ariz. 381, 100 Pac. 1094.

<sup>94</sup> *Rhino v. Emery* (C. C.) 65 Fed. 826.

\$230,000, and the price paid was only \$500. But it appeared that the plaintiff's interest in it depended on a defect in her acknowledgment of the deed by which it had been granted to the said third persons. This defect might render the deed void in law, but legal opinion was divided on the question whether or not it was material. It was held that the contract was hazardous and the price not so inadequate as to warrant a rescission of the sale.<sup>95</sup>

**§ 176. Louisiana Law; Lesion Beyond Moiety.**—According to the law and practice in Louisiana, a vendor of real property may obtain rescission of the sale on showing that the consideration which he received was less than half the value of the property. The principal provisions of the Code relating to this subject are as follows: "Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury is founded on its being the effect of implied error or imposition, for in every commutative contract equivalents are supposed to be given and received. The law, however, will not release a person of full age, and who is under no incapacity, against the effect of his voluntary contracts on account of such implied error or imposition, except in the two following cases: (1) in partition, where there is a difference in the value of the portions to more than the amount of one-fourth to the prejudice of one of the parties; (2) in sales of immovable property, the vendor may be relieved if the price given is less than one-half of the value of the thing sold, but the sale cannot be invalidated for lesion to the injury of the purchaser. Lesion can be alleged by persons of full age in no other sale than one of immovables, in which is included whatever is immovable by destination."<sup>96</sup> And again: "If the vendor has been aggrieved for more than half the value of an immovable estate by him sold, he has the right to demand the rescission of the sale, even in case he had expressly abandoned the right of claiming such rescission, and declared that he gave

<sup>95</sup> *Pennybacker v. Laldley*, 33 W. Va. 624, 11 S. E. 39.

<sup>96</sup> Rev. Civ. Code La., arts. 1860-1862.

to the purchaser the surplus of the thing's value. To ascertain whether there is a lesion beyond moiety, the immovable must be estimated according to the state in which it was, and the value which it had, at the time of the sale. If it should appear that the immovable estate has been sold for less than half its just value, the purchaser may either restore the thing and take back the price which he had paid, or make up the just price and keep the thing. Should the purchaser prefer to keep the thing by making up the just price, he must pay the interest on the additional price from the day when the rescission was demanded. If he chooses rather to restore the thing and to receive the purchase money, he shall be liable to restore the fruits of the estate from the day of the demand, but the interest of his money shall also be paid to him from the same time. The rescission for lesion beyond moiety cannot take place in favor of the purchaser. Rescission for lesion beyond moiety is not granted against sales of movables and produce, nor when rights to a succession have been sold to a stranger, nor in matter of transfer of credits, nor against sales of immovable property made by virtue of any decree or process of a court of justice." <sup>97</sup>

Provision is also made for rescission in the case of an exchange of properties, as follows: "Rescission of the contract on account of lesion is not allowed in contracts of exchange, except in the following cases: The rescission on account of lesion beyond moiety takes place when one party gives immovable property to the other in exchange for movable property; in that case the person having given the immovable estate may obtain a rescission if the movables which he has received are not worth more than the one-half of the value of the real estate. But he who has given movable property in exchange for immovable estate cannot obtain a rescission of the contract, even in case the things given by him were worth twice as much as the immovable estate. Rescission on account of lesion beyond moiety may

<sup>97</sup> Rev. Civ. Code La., arts. 2589-2594. And see *Girault v. Feucht*, 120 La. 1070, 46 South. 26; *Bonnette v. Wise*, 111 La. 855, 35 South. 953.

take place on a contract of exchange, if a balance has been paid in money or immovable property, and if the balance paid exceeds by more than one-half the total value of the immovable property given in exchange by the person to whom the balance has been paid; in that case, it is only the person who has paid such balance who may demand the rescission of the contract on account of lesion."<sup>98</sup>

In bringing suit for rescission under these statutory provisions, it is not necessary to allege fraud,<sup>99</sup> and even if the plaintiff, in addition to the proper and necessary averments, charges that he made the sale through mistake and ignorance of the value of the property, or by reason of misrepresentations of the defendant, this does not change the character of the proceeding.<sup>100</sup> But a plaintiff cannot ask rescission of a sale both for lesion beyond moiety and for nonpayment of the price, as these demands should not be cumulated in the same action.<sup>101</sup> And to avoid a sale for lesion, the inadequacy of the price must be clearly established by strong evidence.<sup>102</sup> A sale which is understood by the parties at the time to be merely a redemption of the land by the purchaser, and the extinguishment of a contested claim to it, cannot be rescinded for lesion.<sup>103</sup> And where one buys an absentee's land at a forced sale for a small sum, and afterwards sells it back to him for a much larger price without warranty, he cannot complain of lesion.<sup>104</sup> So where, on a sale of land acquired by tax title, the vendee assumes all taxes due, some of which were assessed against the vendor, if the amount of taxes assumed, added to the price agreed on, equals the value of the land at the time of the sale, the vendor cannot maintain an action

<sup>98</sup> Rev. Civ. Code La., arts. 2664-2666.

<sup>99</sup> *Belcher & Creswell v. Johnson*, 114 La. 640, 38 South. 481.

<sup>100</sup> *Ware v. Couvillion*, 112 La. 43, 36 South. 220.

<sup>101</sup> *Copley v. Flint*, 16 La. 380.

<sup>102</sup> *Bossier v. Vienne*, 12 Mart. (La.) O. S. 421; *Agaisse v. Guedron*, 2 Mart. (La.) N. S. 73; *Riviere v. Bolssiere*, 5 La. 382; *Shreveport Rod & Gun Club v. Caddo Levee Dist. Com'rs*, 48 La. Ann. 1081, 20 South. 293.

<sup>103</sup> *Copley v. Flint*, 16 La. 380.

<sup>104</sup> *Copley v. Flint*, 1 Rob. (La.) 125.

for lesion.<sup>105</sup> Finally, the right of action for lesion beyond moiety does not extend to a third person buying from a purchaser who obtained the land at an inadequate price, where such third person acted in good faith and paid a fair price therefor, although he had knowledge of the inadequacy of the price given on the first sale.<sup>106</sup>

<sup>105</sup> *Martin v. Delaney*, 47 La. Ann. 719, 17 South. 264.

<sup>106</sup> *Morgan v. O'Bannon*, 125 La. 367, 51 South. 293; *Bradford's Heirs v. Brown*, 11 Mart. (La.) O. S. 217.



## CHAPTER VII

## DEFICIENCY IN QUANTITY OR QUALITY

- § 177. Right of Rescission in General.
- 178. Rule of Caveat Emptor.
- 179. Redhibitory Defects.
- 180. Deficiency in Number or Quantity of Articles Contracted For.
- 181. Defect in Quality as to Installment or Portion of Goods Purchased.
- 182. Sales by Sample.
- 183. Sale "With All Faults."
- 184. Inspection or Testing to Determine Quality.
- 185. Breach of Warranty.
- 186. Same; Seller's Fraud or Knowledge of Unsoundness.
- 187. Same; Agreement for Return if Defective.
- 188. Same; Warranty Against Future Defect or Failure.
- 189. Sale by Producer or Manufacturer of Article.
- 190. Property Purchased for Specified Use.
- 191. Same; Warranty of Fitness for Prescribed Use.
- 192. Sale with Privilege of Return if Not Satisfied.
- 193. Allowance for Tare, Tret, Leakage, etc.
- 194. Offer or Opportunity to Make Good Defect.
- 195. Acceptance and Use of Defective Article.

§ 177. Right of Rescission in General.—When property is delivered in pursuance of a contract of sale, and the buyer finds that it is different from that which he contracted for and therefore unsuitable for his purpose or unsatisfactory to him, or that it is inferior in quality or short in quantity, he has the privilege of refusing to accept the property or of returning it to the seller, and thereupon of rescinding the contract entirely.<sup>1</sup> More especially is this the case where the purchaser was induced to buy by false and fraudulent representations concerning the quality of the goods.<sup>2</sup> If,

<sup>1</sup> *Buettner v. Samuels*, 163 Ill. App. 139; *Starks v. Schlensky*, 128 Ill. App. 1; *Fairbanks, Morse & Co. v. Walker*, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. (N. S.) 558; *Hawkins v. Brown*, 3 Rob. (La.) 310; *Cutler v. Gilbreth*, 53 Me. 176; *Monarch Metal Weather-Strip Co. v. Hanick*, 172 Mo. App. 680, 155 S. W. 858; *Henry Kupfer & Co. v. Pellman*, 67 Misc. Rep. 149, 121 N. Y. Supp. 1081; *Collins v. Brooks*, 20 How. Prac. (N. Y.) 327; *Estes v. Kauffman*, 44 Pa. Super. Ct. 114; *Jesse French Piano & Organ Co. v. Costley* (Tex. Civ. App.) 116 S. W. 135. Contra, see *Hoadley v. House*, 32 Vt. 179, 76 Am. Dec. 167.

<sup>2</sup> *Cushman v. De Mallie*, 46 App. Div. 379, 61 N. Y. Supp. 878.

however, the purchaser does not choose to repudiate the contract altogether, he may accept the property delivered as satisfying the contract in whole or in part, and may either recoup against the purchase price or recover damages for the defect.<sup>3</sup> Illustrations of the application of these rules are frequently seen in the case of machinery ordered and delivered, which proves on inspection or trial to be materially different from what the buyer intended to purchase, or below the specifications of the contract, or inadequate to the purpose for which it was sold.<sup>4</sup> Thus, where one purchases a soda fountain and apparatus, giving notes for the price, and the seller retains title until full payment, with the right to retake possession on default in any payment, and the fountain and apparatus prove to be worthless and not in accordance with the seller's representations and covenants as to their condition and quality, the buyer has the right to rescind without the vendor's consent, if able to restore him to his former condition.<sup>5</sup> So where a windmill pump which plaintiff put up for defendant is so defective as to be useless, defendant is not obliged to accept it and sue for breach of contract, but may rescind the contract and return the property.<sup>6</sup> And sufficient ground for rescission likewise exists where one sells an old sewing machine as a new one,<sup>7</sup> or where old and shop-worn goods are represented and sold as new stock, the deception being aided by a false invoice,<sup>8</sup> or where a person unacquainted with musical instruments is induced to purchase a piano by fraudulent representations concerning its quality and value,<sup>9</sup> or where one has ordered a bill of

<sup>3</sup> *Fox v. Wilkinson*, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107.

<sup>4</sup> *Simrall v. American Multigraph Sales Co.*, 172 Mo. App. 384, 158 S. W. 437; *Western Union Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629, 65 South. 962; *Electric Vehicle Co. v. Price*, 138 Ill. App. 594; *Fairbanks, Morse & Co. v. Walker*, 76 Kan. 903, 92 Pac. 1129, 17 L. R. A. (N. S.) 558.

<sup>5</sup> *Tufts v. Cheatham*, 75 Ga. 865.

<sup>6</sup> *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365.

<sup>7</sup> *Howe Machine Co. v. Rosine*, 87 Ill. 105.

<sup>8</sup> *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

<sup>9</sup> *Couch v. O'Brien*, 41 Okl. 76, 136 Pac. 1088. But where the player part of a player piano was separable and replaceable, it

square-edged lumber for a building which he is about to erect, and finds, on delivery, that some of it is wany-edged.<sup>10</sup> When the buyer is a retailer or jobber or intends to sell again, there is always a covenant or undertaking on the part of the seller, implied at least, that the goods shall be of merchantable quality or in merchantable condition, and if they are found to be not so, the purchaser may rescind.<sup>11</sup> This rule is perhaps especially applicable in the case of food products. Thus, one contracted to buy from a dairy company, for a period of one year, condensed milk averaging a designated amount of butter fat, of good flavor, uniform texture, and proper solubility. The dairy company furnished inferior milk, and though it was notified of the fact, it failed to fulfill the requirements of the contract, whereupon it was held that the buyer was justified in rescinding.<sup>12</sup> And again, although land leased for mining purposes may contain the ore expected to be found there, yet if it is not of such quality as to be workable, or fit for use when extracted, this will excuse the lessee from paying the stipulated rent or royalty.<sup>13</sup>

These rules may also be extended so as to apply to contracts for personal services. If the work performed is inferior in quality to that which was expected and contracted for, that is to say, if it is performed in an unskillful, slovenly, or unworkmanlike manner, or is lacking in that degree of merit or excellence which the person contracted with is capable of infusing into it and which he was expected to impart to it, then the other party to the contract may reject the work and rescind the contract.<sup>14</sup> This is illustrated

was held that the seller's fraud in inducing the buyer to purchase the instrument did not entitle the buyer to rescind, when it appeared that the piano itself complied with the representations. *Smith & Nixon Co. v. Morgan*, 152 Ky. 430, 153 S. W. 749.

<sup>10</sup> *Montgomery v. Ricker*, 43 Vt. 165.

<sup>11</sup> *Olson v. Mayer*, 56 Wis. 551, 14 N. W. 640; *Heidenheimer v. Camp* (Tex. Civ. App.) 142 S. W. 628.

<sup>12</sup> *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495, 70 S. W. 390.

<sup>13</sup> *Kemble Iron Co. v. Scott*, 15 Wkly. Notes Cas. (Pa.) 220.

<sup>14</sup> *Husted v. Craig*, 36 N. Y. 221; *Ferris v. Hoglan*, 121 Ala. 240, 25 South. 834; *Feinberg v. Weiher* (Com. Pl.) 19 N. Y. Supp. 215.

by a case in which the plaintiff, who was an actor, contracted to perform a particular "comedy act" known by a particular name, at the theater owned and operated by the defendant, and which the defendant had previously seen the plaintiff perform elsewhere. But the performance as presented under the contract was materially different from that previously given, by which the comedy was known, and with respect to which defendant had contracted, and it was held that he was entitled to terminate the contract.<sup>15</sup>

But it is said that the purchaser cannot rescind for defects in quality where the seller has expressly refused to give a warranty, and no fraud is alleged or shown,<sup>16</sup> nor where the defect is in any way due to the buyer's own fault or neglect,<sup>17</sup> nor where the contract, fairly interpreted, is sufficiently flexible to admit of minor variations from the standard of quality prescribed.<sup>18</sup>

§ 178. **Rule of Caveat Emptor.**—"Caveat emptor" is a rule of the common law, which implies that the purchaser must take care to examine and ascertain the kind or quality of the article he is purchasing, or provide against any loss he may sustain from his ignorance of the kind or quality of the article sold and from his inability to examine it fully, by an express agreement of warranty.<sup>19</sup> This rule or maxim has no application in cases of fraud. That is, if the purchase of an inferior or defective article is induced by the fraudulent misrepresentations of the seller, or by his intentional and unjustifiable concealment of the defect or cause of inferiority, whereby the purchaser is deceived or misled, then the rule requiring the purchaser to be on his guard cannot be invoked, but he may rescind the purchase on discovering the fault or defect.<sup>20</sup> But if the seller does

<sup>15</sup> *McLaughlin v. Hammerstein*, 99 App. Div. 225, 90 N. Y. Supp. 943.

<sup>16</sup> *Grojean v. Darby*, 135 Mo. App. 586, 116 S. W. 1062.

<sup>17</sup> *Bonds v. Thos. J. Lipton Co.*, 85 Miss. 209, 37 South. 805.

<sup>18</sup> *International Agricultural Corporation v. Stadler*, 212 Fed. 378, 129 C. C. A. 54.

<sup>19</sup> *Wright v. Hart*, 18 Wend. (N. Y.) 449.

<sup>20</sup> *Kell v. Trenchard*, 142 Fed. 16, 73 C. C. A. 202; *Hennessy v. Damourette*, 15 Colo. App. 354, 62 Pac. 229; *Sunasack v. Morey*, 157 Ill. App. 278; *Reval v. Miller*, 178 Ill. App. 208; *Burnett v.*

nothing to trick or deceive the purchaser, and if the latter examines the subject of the sale, and its inferiority or defect is apparent, or if he has a full opportunity to inspect it and could have ascertained its character by the exercise of ordinary care, then the presumption is that he acted entirely upon his own judgment, and he cannot reject the article because it is not of the kind, quality, or degree of excellence which he supposed he was bargaining for.<sup>21</sup> "As applied to sales of personalty, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the rule of caveat emptor applies, and the seller is not liable for defects in the article sold. If the purchaser distrusts his judgment, he can require of the seller a warranty as to quality or condition, and he cannot relieve himself and charge the seller on the ground that the examination will occupy time and is attended with labor and inconvenience. The rule applies even in the case of sales by sample, since the buyer may in such case protect himself by requiring a warranty that the goods to be delivered shall be the same as the sample exhibited."<sup>22</sup> But if goods are sold by description, and not on the buyer's selection, and he has no opportunity to inspect them until after delivery, he has the right to reject them and rescind the contract on discovering that they are defective or inferior, either on the ground that the seller

Hensley, 118 Iowa, 575, 92 N. W. 678; Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031; Wolf v. Michael, 21 Misc. Rep. 86, 46 N. Y. Supp. 991; Sockman v. Keim, 19 N. D. 317, 124 N. W. 64; Hadley v. Clinton County Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Beetle v. Anderson, 98 Wis. 5, 73 N. W. 560. And see, *supra*, §§ 61, 64.

<sup>21</sup> Kellogg Bridge Co. v. Hamilton, 110 U. S. 116, 3 Sup. Ct. 542, 28 L. Ed. 86; Shackelford v. Fulton, 139 Fed. 97, 71 C. C. A. 295; Hansen v. Baltimore Packing & Cold-Storage Co. (C. C.) 86 Fed. 832; Long v. Duncan, 14 Ky. Law Rep. 812; Farrell v. Manhattan Market Co., 198 Mass. 271, 84 N. E. 481, 15 L. R. A. (N. S.) 884, 126 Am. St. Rep. 436, 15 Ann. Cas. 1076; Galbraith v. Whyte, 2 N. C. 464; Springfield Shingle Co. v. Edgecomb Mill Co., 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258. Compare Walker, Evans & Cogswell Co. v. Ayer, 80 S. C. 292, 61 S. E. 557.

<sup>22</sup> Barnard v. Kellogg, 10 Wall. 383, 19 L. Ed. 987. As to sales by sample, see *infra*, § 182.

commits a fraud in substituting inferior articles, or for breach of the implied warranty that the goods delivered shall correspond to the description.<sup>23</sup> This applies also, it seems, to goods sold in closed boxes or barrels or in bales, so that the buyer has no opportunity of determining the quality of the articles, or the extent to which they may be damaged or inferior, until he has opened the containers and examined the contents in detail.<sup>24</sup>

Other exceptions to the rule of caveat emptor are found in the case where the seller is the manufacturer or producer of the article sold, in which case he is supposed to have a knowledge of its constituents, quality, or mode of production which the buyer cannot possess,<sup>25</sup> and in the case where the seller knows that the purchaser is buying the article for a particular use, in which case there is an implied warranty that it is fit for that specific use,<sup>26</sup> and also in cases where the defect in the article sold could only be discovered by one possessing a certain special or technical skill or knowledge, which the particular buyer does not possess.<sup>27</sup>

**§ 179. Redhibitory Defects.**—In the civil law, as administered in Louisiana, “redhibition” is the avoidance of a sale on account of some vice or defect in the thing sold which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice or defect. And a “redhibitory vice” or defect in an article sold is one for which the seller may be compelled to take it back, or a defect against which the seller is bound to warrant.<sup>28</sup> The statute law of that state excludes from the category of redhibitory vices such defects as are appar-

<sup>23</sup> *Hoyle v. Southern Saw Works*, 105 Ga. 123, 31 S. E. 137; *Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, 159 Ala. 491, 49 South. 92.

<sup>24</sup> *Richards v. Burke*, 7 La. Ann. 242; *Summers Fiber Co. v. Walker*, 33 Ky. Law Rep. 153, 109 S. W. 883.

<sup>25</sup> *Infra*, § 189.

<sup>26</sup> *Infra*, §§ 190, 191.

<sup>27</sup> See *Sanford & Brooks Co. v. Columbia Dredging Co.*, 177 Fed. 878, 101 C. C. A. 92. And see, *supra*, §§ 61, 64.

<sup>28</sup> Civ. Code La. art. 2520; Pothier, *Contract of Sale*, No. 203.

ent, because these the buyer may be supposed to have discovered for himself, but this does not include defects of goods sold in closed boxes or barrels, so that, for instance, if vegetables sold in that manner are found to be in a condition making them unfit for use, the purchaser can rescind without an offer to return the goods.<sup>29</sup> An action to rescind a contract of sale may be maintained on account of a redhibitory defect, although there was no express warranty.<sup>30</sup> And when the court is satisfied from the evidence that any one of the redhibitory vices existed at the time of the sale, and that it became apparent within a short time after the sale, it will annul the sale and decree a return of the price paid.<sup>31</sup>

**§ 180. Deficiency in Number or Quantity of Articles Contracted For.**—Where a seller delivers or offers to deliver a less quantity of goods than was contracted for, the buyer is not compelled to accept such a partial performance, if the deficiency is material and the contract indivisible, but may reject the tender and rescind the contract.<sup>32</sup> This rule is applied chiefly in cases where a collection of articles is sold as an entirety. Thus where a contract is made for the sale of a stock of goods at a certain percentage of their cost, and the seller withholds a portion of the stock or refuses to let it go at the price agreed on, the buyer may repudiate the whole contract.<sup>33</sup> So where plaintiff agreed to sell to defendant the furniture and household goods used in his hotel, and gave an itemized list of the goods sold, but when he delivered them, many of the articles named in the list could not be found, it was held that defendant was entitled to rescind the sale.<sup>34</sup> In another case, the plaintiff purchased the furniture, fixtures, and good will of a rooming

<sup>29</sup> *Richards v. Burke*, 7 La. Ann. 242.

<sup>30</sup> *Icar v. Suares*, 7 La. 517; *Maurin v. Martinez*, 5 Mart. (La.) O. S. 432.

<sup>31</sup> *Lynch v. McRee*, 18 La. Ann. 640.

<sup>32</sup> *J. A. Ruhl Clothing Co. v. Singleton*, 161 Mo. App. 366, 143 S. W. 529; *Boyd v. Second Hand Supply Co.*, 14 Ariz. 36, 123 Pac. 619. See *William Hanley Co. v. Combs*, 60 Or. 609, 119 Pac. 333; *Spence v. Hull*, 75 Or. 267, 146 Pac. 95.

<sup>33</sup> *Behrman v. Newton*, 103 Ala. 525, 15 South. 838.

<sup>34</sup> *Kuhlman v. Wood*, 81 Iowa, 128, 46 N. W. 738.



house from defendant, giving part cash and a series of notes for the balance. After title had passed, defendant surreptitiously removed a quantity of the goods from the house. It was held that plaintiff was not limited to a suit at law for conversion, but was entitled to sue in equity, and to a decree directing a cancellation of so much of the debt as represented the value of the property retained, and to a surrender of notes equal to such sum.<sup>85</sup> So where one contracted to sell and deliver 1,000 gallons of oysters per day for a specified period, but his deliveries actually ranged from 10 gallons to about 300 gallons a day, it was held that the other party was justified in refusing to continue the contract.<sup>86</sup> But, as appears from this case and others like it, while one may be warranted in breaking off a contract calling for continuous or successive deliveries, on account of deficiency in the quantity delivered, he can rescind only as to the future performance of the contract, and must pay for what he has actually received and retained. Thus, in a case in New York, the contract was to sell and deliver six engines as they were required, and after delivery of two of the engines, the third was called for and delivery of it refused. It was held that the contract might be rescinded and that any money advanced above the contract price of the two engines delivered might be recovered back.<sup>87</sup>

If the number or quantity is not specifically stated, but is only intended to be approximate, the right to rescind will depend on the materiality of the deficiency. Thus, in a contract for the sale of a ranch and the cattle on it, where the seller does not undertake to specify the number of cattle, but gives an estimate as to the number, the buyer is not entitled to rescind the contract because of a deficiency in the number unless this deficiency is material and he is injured by the incorrectness of the seller's estimate.<sup>88</sup> So, in a lease of coal lands, where the coal was known to exist, and the quantity present was as definitely ascertained as it could be short of being actually mined out, the exhaus-

<sup>85</sup> *Brown v. Statter*, 206 Mass. 119, 92 N. E. 78.

<sup>86</sup> *La Vallette v. Booth*, 131 N. C. 36, 42 S. E. 446.

<sup>87</sup> *Frost v. Smith*, 7 Bosw. (N. Y.) 108.

<sup>88</sup> *Blair v. Baird*, 43 Tex. Civ. App. 134, 94 S. W. 116.

tion of the deposit is no defense to an action for the royalty stipulated to be paid annually during the term of the lease.<sup>39</sup> But of course any positive false statements of the seller concerning the number or quantity of articles sold, relied on by the buyer and deceiving him, will constitute a fraud such as to authorize rescission of the contract.<sup>40</sup>

**§ 181. Defect in Quality as to Installment or Portion of Goods Purchased.**—The buyer of goods of a specified quality and description may refuse to accept the entire shipment, unless all of it corresponds with the contract.<sup>41</sup> And where successive deliveries of goods of certain qualities and quantities are to be made at stated periods, and the first deliveries are not according to the contract, the purchaser has the option, not only of rejecting those which are of an inferior quality, but of rescinding the entire contract and of refusing to accept any further deliveries between the time he so notifies the seller and the end of the stipulated period,<sup>42</sup> and this although goods subsequently tendered or offered to be delivered are in all respects equal to the grade and quality contemplated by the contract.<sup>43</sup> But the buyer must base his objections and his claim for rescission distinctly on the ground of a lack of correspondence between the goods delivered and the specifications of the con-

<sup>39</sup> *Timlin v. Brown*, 158 Pa. 606, 28 Atl. 236; *Light v. E. M. Grant & Co.*, 73 W. Va. 56, 79 S. E. 1011, 51 L. R. A. (N. S.) 792.

<sup>40</sup> *Dyer v. Cowden*, 168 Mo. App. 649, 154 S. W. 156; *Kiefhaber Lumber Co. v. Newport Lumber Co.*, 15 Cal. App. 37, 113 Pac. 691.

<sup>41</sup> *Wiburg & Hannah Co. v. U. P. Walling & Co. (Ky.)* 113 S. W. 832. But compare *Stelwagon v. Wilmington Coal-Gas Co.*, 2 Marv. (Del.) 184, 42 Atl. 449. And see *Sleepy Eye Milling Co. v. Hartman*, 184 Ill. App. 308.

<sup>42</sup> *Moran v. Wagner*, 28 App. D. C. 317; *Quwack v. Cruse*, 1 Wils. (Ind.) 320; *Enterprise Mfg. Co. v. Oppenheim, Oberndorf & Co.*, 114 Md. 368, 79 Atl. 1007, 38 L. R. A. (N. S.) 548; *Clark v. Baker*, 5 Metc. (Mass.) 452; *Grafeman Dairy Co. v. St. Louis Dairy Co.*, 96 Mo. App. 495, 70 S. W. 390; *Walker v. Davis*, 65 N. H. 170, 18 Atl. 196; *Campbell v. Gates*, 10 Pa. 483; *King Philip Mills Co. v. Slater*, 12 R. I. 82, 34 Am. Rep. 603. Compare *J. W. Ellison, Son & Co. v. Flat Top Grocery Co.*, 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539.

<sup>43</sup> *Ungerer & Co. v. Louis Maull Cheese & Fish Co.*, 155 Mo. App. 95, 134 S. W. 56. But see *Newton v. Bayless Fruit Co.*, 155 Ky. 440, 159 S. W. 988.

tract. He cannot reject a shipment which complies with the requirements of the contract because he is dissatisfied with it on some other ground. Thus where one contracted in writing to buy an assortment of jewelry specifically described, and there was nothing in the contract requiring the goods to be salable in a particular place or that they should be low priced goods, the buyer cannot rescind on the ground that the jewelry delivered under the contract was too high priced for him to handle and would not sell in the neighborhood.<sup>44</sup> And further, a buyer who means to stand upon his strict rights in this particular must be careful not to condone the delivery of defective or inferior articles. If, from time to time, he sorts out the inferior articles from a shipment and permits their replacement by articles of the required grade, this may create such a course of dealing between the parties as will oblige the buyer to continue in the practice of it and prevent him from afterwards repudiating the contract as a whole for inferiority of the goods furnished.<sup>45</sup> The converse of the principal rule stated above is equally true. That is, if goods are contracted to be delivered in installments, and the first delivery is rejected and returned by the buyer as being defective, this constitutes such a breach of the contract as will give the seller a right to rescind.<sup>46</sup>

The case is somewhat different where a sale, made for a specified aggregate price, includes several different and unrelated articles, one or more of which are found to be defective or below the grade intended by the contract. An early case in Louisiana holds that if the articles included in the contract are independent of each other and do not form a whole, and are not increased in value by their union, the sale can be avoided only as to those found inferior or defective, and must be enforced as to the remainder.<sup>47</sup> But there is also some authority on the other side of the question.<sup>48</sup>

<sup>44</sup> *Main v. Procknow*, 131 Wis. 279, 111 N. W. 508.

<sup>45</sup> *Whiting Foundry Equipment Co. v. Hirsch*, 121 Ill. App. 373.

<sup>46</sup> *Ganser v. Weber*, 35 Misc. Rep. 303, 71 N. Y. Supp. 773.

<sup>47</sup> *Ledoux v. Armor*, 4 Rob. (La.) 381.

<sup>48</sup> *McCormick Harvesting Mach Co. v. Courtright*, 54 Neb. 18, 74 N. W. 418.

§ 182. **Sales by Sample.**—When goods are sold by sample, there is an implied warranty on the part of the seller that the bulk of the property shall correspond with the sample, and shall be at least in the average of equal quality, kind, or grade with the specimen exhibited; and if, on delivery and inspection, they are found to be inferior to the sample, it is the privilege of the buyer, acting with reasonable promptness, to reject and return the goods and rescind the contract of purchase.<sup>49</sup> It is further a condition of a sale by sample that the buyer shall be allowed to inspect the goods delivered in order to determine their correspondence with the sample, and if, for instance, delivery is made in a closed cask, box, or bale, and the vendor refuses to allow it to be opened, the purchaser cannot be required to accept the goods and pay the price.<sup>50</sup> Also he must be allowed a reasonable length of time within which to make his inspection, and even the destruction of the goods after delivery cannot deprive the buyer of the right of repudiating the contract, when a reasonable time for examination has not elapsed.<sup>51</sup> But on the other hand, if he keeps the goods and uses them as his own, after time allowed for inspection, he cannot rescind the purchase, though he may maintain an action for breach of the implied warranty.<sup>52</sup> But the warranty on a sale by sample extends no further than the assertion that the sample is fairly representative of the whole. “Every person who exhibits a sample of goods for sale impliedly represents or warrants that the sample has been fairly taken from the bulk of the commodity, and he

<sup>49</sup> *Magee v. Billingsley*, 3 Ala. 679; *Merriman v. Chapman*, 32 Conn. 146; *Borden v. Fine*, 212 Mass. 425, 98 N. E. 1073; *Whitmore v. South Boston Iron Co.*, 2 Allen (Mass.) 52; *Lothrop v. Otis*, 7 Allen (Mass.) 435; *Columbia River Packers' Ass'n v. Springfield Grocer Co.*, 129 Mo. App. 132, 108 S. W. 113; *Broderick v. Hartman*, 141 Mo. App. 259, 124 S. W. 1060; *American Art Metal Novelty Co. v. A. C. Bosselman & Co. (Sup.)* 91 N. Y. Supp. 722; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Leonard v. Fowler*, 44 N. Y. 289; *Boyd v. Wilson*, 83 Pa. 319, 24 Am. Rep. 176; *Azemar v. Casella*, L. R. 2 C. P. 677; *Parker v. Palmer*, 4 B. & Ald. 387; *Parkinson v. Lee*, 2 East, 314.

<sup>50</sup> *Isherwood v. Whitmore*, 11 Mees. & W. 347.

<sup>51</sup> *Magee v. Billingsley*, 3 Ala. 679.

<sup>52</sup> *Magee v. Billingsley*, 3 Ala. 679; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

does no more than this. The purchaser takes the risk of all latent defects and infirmities inherent in the article and unknown to the seller, whether they arise from natural causes or fraudulent dealings with the goods by persons through whose hands they have passed.”<sup>53</sup> The rule or maxim “caveat emptor,” it is said, “applies even in the case of sales by sample, since the buyer may in such case protect himself by requiring a warranty that the goods to be delivered shall be the same as the sample exhibited.”<sup>54</sup> Thus, this rule was applied to a case where a United States marshal sold a lot of tobacco by samples, the samples being good and undamaged but the tobacco as a whole being bad, where the whole was accessible for examination.<sup>55</sup> But it has also been held that even an inspection and subsequent acceptance of goods bought by sample does not preclude the buyer from rescinding, when it appears that the defect or inferiority could not have been discovered by the inspection made.<sup>56</sup>

§ 183. **Sale “With All Faults.”**—One who buys property “with all faults” cannot rescind on account of any defects or imperfections in the property existing at the time of the sale which do not destroy its identity, where there is no positive fraud or misrepresentation. It has been said that this phrase means “with all the faults which the article may have consistently with its being the thing described,” and where a ship was advertised as a “copper fastened vessel, to be sold with all faults,” and she was not so far copper fastened as to pass among ship-owners by that description, it was held that the vendor was liable for a breach of warranty, notwithstanding the reservation as to all faults.<sup>57</sup> “The meaning of selling ‘with all faults’ is that the purchaser shall make use of his eyes and understanding to discover what faults there are; but I admit that the ven-

<sup>53</sup> 2 Add. Torts (Wood’s edn.) § 1194, citing *Parkinson v. Lee*, 2 East, 320; *Omrod v. Huth*, 14 Mees. & W. 663; *Carter v. Crick*, 4 Hurl. & N. 412; *Mody v. Gregson*, L. R. 4 Ex. 49.

<sup>54</sup> *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987.

<sup>55</sup> *The Monte Allegre*, 9 Wheat. 616, 6 L. Ed. 174.

<sup>56</sup> *Pennock v. Stygles*, 54 Vt. 226.

<sup>57</sup> *Shepherd v. Kalne*, 5 B. & Ald. 240.

dor is not to make use of any fraud or artifice to conceal a defect.”<sup>58</sup> So, “a sale of a chattel to a purchaser ‘with all faults’ does not mean that the purchaser is to take it with all frauds. Such a stipulation therefore will not protect the vendor from an action for deceit, if he has resorted to any artifice to conceal a defect, or has made use of any false representation for the purpose of lulling to sleep the vigilance of the purchaser.”<sup>59</sup>

**§ 184. Inspection or Testing to Determine Quality.—** A purchaser of a chattel always has the right to inspect or test it in order to ascertain its quality, and if it proves to be defective on being so tested, he is not deprived of his right to rescind the sale and return the article because the written contract provides that the article is “not placed on trial.”<sup>60</sup> The test or trial should be fair and thorough, but need not extend to every article or item in a consignment when all are supposed to be alike. Thus, where telephones sold by defendant to plaintiff were admittedly all of the same quality, the buyer, on testing half of the telephones and finding that they would not work, was held entitled to rescind the contract for breach of warranty without testing the others.<sup>61</sup> But where the purchase is not made until after an examination or inspection by the purchaser, supposing him to possess the knowledge of the subject, which would enable him to make a correct estimate, he is considered to have acted on his own judgment, and cannot afterwards complain of defects.<sup>62</sup> If the buyer, on delivery of a group or collection of articles, makes an inspection and rejects some of them

<sup>58</sup> *Pickering v. Dowson*, 4 Taunt. 784, per Heath, J. And see *Smith v. Andrews*, 30 N. C. 6.

<sup>59</sup> 2 Add. Torts (Wood's edn.) § 1207.

<sup>60</sup> *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689, 146 N. W. 957.

<sup>61</sup> *Chicago Telephone Supply Co. v. Marne & Elkhorn Telephone Co.*, 134 Iowa, 252, 111 N. W. 935.

<sup>62</sup> *Forsman v. Mace*, 111 La. 28, 35 South. 372. A dealer who purchased fruit after an inspection thereof on the trees and whose agent superintended the packing cannot, even though he contracted for merchantable fruit only, rely on an inspection made at destination, and thus escape liability for the contract price on the ground that unmerchantable fruit was shipped. *Golden v. White*, 42 App. D. C. 39.

as defective or below grade, when in fact they all conform to the requirements of the contract, he will be answerable in damages to the seller; but the seller's right to rescind for such improper rejection will depend on the purchaser's good faith, the rule being that if the buyer's conduct in so rejecting was fraudulent, the seller may terminate the contract, but not so if it was done in good faith and by mistake.<sup>63</sup> A contract by which the maker of machinery agrees to deliver and set up a piece of machinery of a specified capacity, to be determined by a test made after the machinery is in place, is executory, and may be rescinded by the purchaser if the test fails to show compliance with the contract.<sup>64</sup> But where a machine is taken on trial, the buyer to pay for it if he likes it, he is bound to give it a fair trial, and cannot return it if he uses it for a whole season but without fairly testing it. "The trial was to ascertain whether defendant liked it, and not to ascertain whether it was equal to the recommendations. To this trial defendant was bound to bring honesty of purpose. Anything short of that would not determine his wishes fairly, but only his caprice or dishonorable design. To it he was not bound to bring any more capacity or judgment than he had, for he was only to ascertain his own wishes, and these could be measured by no judgment or capacity but his own. He was not to determine what would be the wishes of ordinary persons under like circumstances."<sup>65</sup>

§ 185. **Breach of Warranty.**—Where property is sold with an express warranty of quality, grade, or capacity, and it is found that it does not fulfill the requirements of the contract, the courts have been very much divided in opinion upon the question whether this breach of warranty, by itself, will give the buyer the right to rescind and reject the article delivered, or whether he is restricted to his action for damages upon the covenant of warranty. The decisions

<sup>63</sup> *William Hanley Co. v. Combs*, 48 Or. 409, 87 Pac. 143; *P. Sheeran & Co. v. Russell & Hutcherson*, 145 Ky. 223, 140 S. W. 195.

<sup>64</sup> *Smith v. York Mfg. Co.*, 58 N. J. Law, 242, 33 Atl. 244. And see *Miller v. Layne & Bowler Co.* (Tex. Civ. App.) 151 S. W. 341; *Colean Mfg. Co. v. Blanchett*, 16 N. D. 341, 113 N. W. 614.

<sup>65</sup> *Hartford Sorghum Co. v. Brush*, 43 Vt. 528.



are quite irreconcilable, and it is only possible to state the two conflicting rules and cite the cases which severally support them. In the first place, many decisions maintain that a buyer is entitled to rescind for breach of warranty, without any provision in the contract giving him the right to do so, and without showing any fraud on the part of the seller; that is, he is entitled to receive an article corresponding in all particulars with the details warranted, and if the article delivered to him does not answer the warranty, it is his right to reject and return it and cancel the sale.<sup>66</sup> But it is maintained by a body of authorities quite equal in number and importance to those just cited, that there can be no rescission for mere breach of warranty. If there is no provision in the contract contemplating the return of the article if not up to grade, and if no fraud or false representation on the part of the seller is shown, and if the seller will not consent to a return of the article and the cancellation of the sale, then, according to these authorities, the buyer has no privilege of rescission, but must resort to

<sup>66</sup> *Rubin v. Sturtevant*, 80 Fed. 930, 26 C. C. A. 259; *Millsapp v. Woolf*, 1 Ala. App. 599, 56 South. 22; *Connersville Co-operative Creamery Ass'n v. Baltz*, 180 Ill. App. 376; *Prickett v. McFadden*, 8 Ill. App. 197; *Matthews v. Fuller*, 8 Ill. App. 529; *Sparling v. Marks*, 86 Ill. 125; *Howe Machine Co. v. Rosine*, 87 Ill. 105 (but as to Illinois, see the cases cited in the next note); *Chicago Telephone Supply Co. v. Marne & Elkhorn Telephone Co.*, 134 Iowa, 252, 111 N. W. 935; *Timken Carriage Co. v. C. S. Smith & Co.*, 123 Iowa, 554, 99 N. W. 183; *Rogers v. Hanson*, 35 Iowa, 283; *Marston v. Knight*, 29 Me. 341; *Clements v. Smith*, 9 Gill (Md.) 156; *Taymon v. Mitchell*, 1 Md. Ch. 496; *McCeney v. Duvall*, 21 Md. 166; *Lane v. Lantz*, 27 Md. 211; *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426, 90 N. E. 983; *Bryant v. Isburgh*, 13 Gray (Mass.) 607, 74 Am. Dec. 655; *Morse v. Brackett*, 98 Mass. 205; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196; *Dorr v. Fisher*, 1 Cush. (Mass.) 271; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Smith v. Means*, 170 Mo. App. 158, 155 S. W. 454; *Sinamon v. Moore*, 161 Mo. App. 168, 142 S. W. 494; *Baskerville v. Johnson*, 20 S. D. 88, 104 N. W. 913; *Garr, Scott & Co. v. Young* (Tenn. Ch. App.) 62 S. W. 631; *Konnerup v. Allen*, 56 Wash. 292, 105 Pac. 639; *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032 (but compare *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105); *Kohl v. Bradley, Clark & Co.*, 130 Wis. 301, 110 N. W. 265; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Boothby v. Scales*, 27 Wis. 626; *Bracken v. Fidelity Trust Co.*, 42 Okl. 118, 141 Pac. 6, L. R. A. 1915B, 1216.

his action for damages for breach of the warranty.<sup>67</sup> In some of the states this matter has been regulated by statute, and it is provided that "the breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition."<sup>68</sup> But there is substantial authority for holding that a warranty of quality given on a sale, without any fraud, may be treated as making the sale one upon condition subsequent at the election of the purchaser, thus giving him the right to rescind on failure of the article to correspond with the warranty.<sup>69</sup>

But even if it is recognized as the right of the vendee to rescind the sale on account of a breach of warranty of quality or condition, without showing fraud, yet it is held that this cannot be done on account of slight defects, though they may constitute a breach of the warranty *pro tanto*, but only

<sup>67</sup> *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595; *Hafer v. Cole*, 176 Ala. 242, 57 South. 757; *Buckingham v. Osborne*, 44 Conn. 133; *Dawson v. Pennaman*, 65 Ga. 698; *Clark v. Neufville*, 46 Ga. 261; *Tokhelm Mfg. Co. v. Stoyles*, 142 Ill. App. 198; *Sturges & Burn Mfg. Co. v. Great Western Smelting & Refining Co.*, 156 Ill. App. 474; *Mayes v. Rogers*, 47 Ill. App. 372; *Hoover v. Sidener*, 98 Ind. 290; *Marsh v. Low*, 55 Ind. 271; *Nave v. Powell*, 52 Ind. App. 496, 96 N. E. 395; *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *H. W. Williams Transp. Line v. Darius Cole Transp. Co.*, 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939; *Wirth v. Fawkes*, 109 Minn. 254, 123 N. W. 661, 134 Am. St. Rep. 778; *Lynch v. Curfman*, 65 Minn. 170, 68 N. W. 5; *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373, 13 N. W. 149; *Knoblauch v. Kronschnabel*, 18 Minn. 300 (Gil. 272); *Walls v. Gates*, 6 Mo. App. 242; *Gelb v. Waller* (Sup.) 115 N. Y. Supp. 201; *Giordano v. Nizzari*, 115 N. Y. Supp. 719; *Brown v. Warwick*, 80 Misc. Rep. 241, 141 N. Y. Supp. 919; *Langworthy v. Beardsley*, 1 City Ct. R. (N. Y.) 170; *Kauffman Milling Co. v. Stuckey*, 40 S. C. 110, 18 S. E. 218; *Lewis v. Rountree*, 78 N. C. 323; *Simonson v. Jenson*, 14 N. D. 417, 104 N. W. 513; *Kase v. John*, 10 Watts (Pa.) 107, 36 Am. Dec. 148; *Freyman v. Knecht*, 78 Pa. 141; *Belew v. Clark*, 4 Humph. (Tenn.) 506; *Wright v. Davenport*, 44 Tex. 164; *Jesse French Plano & Organ Co. v. Garza*, 53 Tex. Civ. App. 346, 116 S. W. 150; *Fetzer v. Haralson* (Tex. Civ. App.) 147 S. W. 290; *West v. Cutting*, 19 Vt. 536; *Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co.*, 74 W. Va. 228, 81 S. E. 976.

<sup>68</sup> Civ. Code Cal., § 1786; Rev. Civ. Code Mont., 1907, § 5121; *Harron, Rickard & McCone v. Sisk*, 19 Cal. App. 628, 127 Pac. 355.

<sup>69</sup> *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Dorr v. Fisher*, 1 Oush. (Mass.) 271.

on account of defects which render the article substantially worthless.<sup>70</sup> And further, the right of rescission for breach of warranty can be exercised only in cases where the seller can be restored to his original situation.<sup>71</sup> On the other hand, if rescission for breach of warranty is denied, the rule must be restricted to cases where specific and definitely ascertained personal property is sold and delivered;<sup>72</sup> it does not apply to sales of property not identified or separated out, but sold generally with a guaranty that what is delivered shall conform to a certain standard.

**§ 186. Same; Seller's Fraud or Knowledge of Unsoundness.**—If a vendor warrants the article to be of a certain grade or quality, or to be sound or free from defects, when in fact he knows that it is not so, his false representations constitute such a fraud as will justify the purchaser in rescinding the contract, and returning the article, irrespective of the breach of the warranty.<sup>73</sup> Thus, where defendant sold plaintiff horses and other personal property, falsely and fraudulently representing the horses to be sound, on which representations the plaintiff relied, and afterwards defendant delivered the horses and some personal property corresponding to that sold, but of less value, it was held that the contract was effectually rescinded when, the next day, on discovering the fraud, plaintiff notified the defendant that he would not accept the property and requested him to take it away.<sup>74</sup>

**§ 187. Same; Agreement for Return if Defective.**—If the contract of sale contains an express or implied agreement that the article sold with warranty may be returned to the seller if found defective or not to correspond with

<sup>70</sup> *Skinner v. Mulligan*, 56 Ill. App. 47; *Isaacs v. Wanamaker*, 71 Misc. Rep. 55, 127 N. Y. Supp. 346; *Rivers v. Gruget*, 2 Nott & McC. (S. C.) 265.

<sup>71</sup> *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77.

<sup>72</sup> *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546.

<sup>73</sup> *Clark v. Wooster*, 79 Conn. 126, 61 Atl. 10; *Muller v. Eno*, 14 N. Y. 597; *Kiernan v. Rocheleau*, 19 N. Y. Super. Ct. 148; *Voorhees v. Earl*, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; *Kase v. John*, 10 Watts (Pa.) 107, 36 Am. Dec. 148; *Allen v. Anderson*, 3 Humph. (Tenn.) 581, 39 Am. Dec. 197.

<sup>74</sup> *Spaulding v. Hanscom*, 67 N. H. 401, 32 Atl. 154.

the warranty, in that case the purchaser is not confined to an action upon the warranty, but may rescind the contract on discovering the defective or inferior character of the article.<sup>75</sup> Thus, where defendant sold plaintiff a stallion, with a warranty of its soundness and of good capacity as a foal-getter, and it was agreed that if the warranties were untrue the horse might be returned and another delivered in its place, it was held that, on refusal of the seller to deliver another stallion as agreed, the purchaser was not confined to an action for damages, but might rescind.<sup>76</sup> And it is said that there is no legal distinction between the sale of a horse with warranty, and an exchange of horses with the same warranty; and if the right of returning the horse is superadded, the right to rescind the contract is unquestionable.<sup>77</sup> But where such an agreement for return exists, if the purchaser returns the property, declaring it to be inferior or unsound, when such is not the case, there is no rescission of the sale, and the purchaser remains liable.<sup>78</sup> In any case, it is not sufficient for him to tender a return of the article and declare that he does so because of its defective or inferior quality, but, if this is not assented to by the seller, the purchaser must be prepared to prove that the article does not correspond with the terms of the warranty.<sup>79</sup>

**§ 188. Same; Warranty Against Future Defect or Failure.**—It has been shown in an earlier section that representations by the seller of an article as to its future utility, capacity, efficiency, or durability, are generally regarded as merely promissory representations, and as statements of opinion rather than assertions of fact, and therefore the failure of the article to redeem the promises made for it will not give ground for rescission of the sale.<sup>80</sup> But it is oth-

<sup>75</sup> *Latham v. Hartford*, 27 Kan. 249; *Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716; *Nave v. Powell*, 52 Ind. App. 496, 96 N. E. 395; *Texas Machinery & Supply Co. v. Ayers Ice Cream Co.* (Tex. Civ. App.) 150 S. W. 750.

<sup>76</sup> *Berkey v. Lefebure & Sons*, 125 Iowa, 76, 99 N. W. 710.

<sup>77</sup> *Miller v. Grove*, 18 Md. 242.

<sup>78</sup> *Swann v. West*, 41 Miss. 104.

<sup>79</sup> *Edgerly v. Gardner*, 9 Neb. 130, 1 N. W. 1004.

<sup>80</sup> *Supra*, § 86.

erwise where the seller gives a written warranty of future performance. By so doing, he backs his opinion by an agreement to assume responsibility for its correctness, and converts his promises into conditions. Thus where, on the sale of an automatic piano, the seller represented and warranted that the piano, properly used and handled, would give the buyer no trouble, and would require no repairs for five years, and the buyer relied on the truth of these representations, and they were the consideration for the sale, but they were untrue and incorrect in that, although the piano was carefully used, it began to get out of order and failed to operate, though properly connected with a sufficient electric current, immediately after the sale, and continued from time to time since the sale to fail to operate, and the buyer could not discover the exact nature of the defect, it was held that these facts stated a good cause of action for the rescission of the sale.<sup>81</sup> It is also a rule that if one offers to sell an article of a certain kind and description, with a warranty as to its future efficiency or durability, but delivers to a purchaser an article of a different kind or description, the purchaser is not obliged to accept the delivery and rely on his remedy on the warranty, but may refuse to accept the property offered and rescind the contract of sale.<sup>82</sup> And further, if a machine is offered to the public generally, by means of printed circulars, stating that a written warranty of its durability will be given, and the offer is accepted by an intending purchaser, the seller cannot thereafter restrict his proposed warranty by further conditions or limitations, and if he insists upon so doing, the purchaser may refuse to accept the property, and an action for the price cannot be maintained.<sup>83</sup>

**§ 189. Sale by Producer or Manufacturer of Article.—**Where an order for a particular article is sent directly to

<sup>81</sup> *Jesse French Piano & Organ Co. v. Garza*, 53 Tex. Civ. App. 346, 116 S. W. 150.

<sup>82</sup> *Huson Ice & Machine Works v. Bland*, 167 Ala. 391, 52 South. 445; *Puritan Mfg. Co. v. Renaker*, 32 Ky. Law Rep. 593, 106 S. W. 813.

<sup>83</sup> *Becker v. Calderwood*, 102 Iowa, 529, 69 N. W. 536, 71 N. W. 425.

the manufacturer or producer of it, and is accepted, there is an implied provision in the contract that the article delivered shall be genuine, and really made or produced by the seller, and no substitution is permitted, so that the purchaser is not bound to accept an article made or produced by a third person, even though it is equal in grade and quality to that which he expected to receive.<sup>84</sup> Furthermore, the manufacturer or producer of an article is supposed to have complete and intimate knowledge, not only of the process of its manufacture, but also of its merchantable quality and of its adaptability and serviceability with reference to any of the particular uses for which he offers to sell it. As to these matters, the purchaser does not stand upon an equality with him, and may fairly be presumed to rely upon the manufacturer's superior information. Therefore, in all such cases of purchase from the maker or producer, there is an implied warranty against any latent defects arising in the process of manufacture and not disclosed to the buyer, and also an implied warranty of adaptability, usefulness, and generally of quality, and upon discovering that the article does not correspond with this implied warranty, the purchaser may refuse to accept the article delivered, or return it, and repudiate and rescind the contract.<sup>85</sup>

**§ 190. Property Purchased for Specified Use.**—If an article is purchased for a specific and particular use, and that fact and the nature of the proposed use are made known to the seller at the time, there is an implied undertaking on his part that the article shall be fit and serviceable for such use, and if it is not so, the buyer may rescind

<sup>84</sup> *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Johnson v. Raylton*, 7 Q. B. Div. 438; *Boulton v. Jones*, 2 Hurl. & N. 564.

<sup>85</sup> *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 116, 3 Sup. Ct. 542, 28 L. Ed. 86; *Joslyn v. Cadillac Automobile Co.*, 177 Fed. 863, 101 C. C. A. 77; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28; *Hoult v. Baldwin*, 67 Cal. 610, 8 Pac. 440; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Jones v. Bright*, 3 Moore & P. 174; *Brown v. Edgington*, 2 Man. & G. 279; *Laing v. Fidgeon*, 4 Camp. 169; *Shepherd v. Pybus*, 3 Man. & G. 868; *Randall v. Newson*, 2 Q. B. Div. 102. Compare *Worcester Mfg. Co. v. Waterbury Brass Co.*, 73 Conn. 554, 48 Atl. 422.

the contract and return the article.<sup>86</sup> "It appears to be a distinction well founded both on reason and on authority," says an English judge, "that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."<sup>87</sup> Thus, in an action for the purchase price of certain type-setting machines sold to the defendant, where the plaintiff represented that the machines would not break the type, and were suitable and valuable for setting up type, upon which representations the defendant relied, if in fact the machines were defective for the purpose for which they were bought, defendant will be entitled to rescind the contract, even in the absence of express representations of quality and value.<sup>88</sup> So the right of one who has purchased boilers to rescind the contract, after they have been delivered and set up, because they are not of the capacity guaranteed, extends to an iron smokestack furnished under the same contract, and which is a part of the boiler plant and adapted especially for boilers of that manufacture.<sup>89</sup> On the same principle, it is said that the adaptability of land, which is the subject of sale, for a site for an irrigating pumping plant differs from its availability for such purpose; for its adaptability is neutralized by nonavailability, growing out of the fact that it is cut off from the water supply by the lands of others, so that adaptability counts for nothing in determining the value in a proceeding for relief against the contract.<sup>90</sup> This rule is

<sup>86</sup> *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670; *Byers v. Chapin*, 28 Ohio St. 300; *Southern Gas & Gasoline Engine Co. v. Peveto* (Tex. Civ. App.) 150 S. W. 279; *Paige v. McMillan*, 41 Wis. 337; *Boothby v. Scales*, 27 Wis. 626.

<sup>87</sup> *Brown v. Edgington*, 2 Man. & G. 289.

<sup>88</sup> *Walker, Evans & Cogswell Co. v. Ayer*, 80 S. C. 292, 61 S. E. 577.

<sup>89</sup> *Smith v. York Mfg. Co.*, 58 N. J. Law, 242, 33 Atl. 244.

<sup>90</sup> *Smart v. Bibbins*, 109 La. 986, 34 South. 49.



not inapplicable where the sale is made by sample. One who purchases, by sample, a chattel intended for a particular purpose, known to the seller, may rescind the sale, even after acceptance of it, on discovering a latent defect.<sup>91</sup>

But the implied warranty of the seller extends no further than the description which is given to him of the intended use of the article. If only a general description of the proposed use is given, he cannot be responsible for unsuitability of the article in respect to details not disclosed. Thus, one who buys a second-hand printing press, saying merely that he wants one to print a seven-column quarto newspaper, and not being able to charge any fraud or misrepresentation on the seller, and who gets a press which will do the work described, cannot rescind because it will not print the blank sides of "patent insides" and match the margins.<sup>92</sup> Further, the purchaser of an article seeking to rescind the contract of sale, on the ground of the unfitness of the article for the use for which it was sold, where it is his duty to expend labor and skill in order to render the article fit for that use, impliedly warrants that the ultimate unfitness of the article is not occasioned by any fault of his own.<sup>93</sup> And it is also a part of his duty, before attempting to rescind, to put the article to the test of actual use or experiment, in order to determine whether it really is fit or unfit.<sup>94</sup> Where a contract for a building or other structure gives the owner the right to supervise and inspect the work as it progresses by his representative, with power to approve or reject material or workmanship, after the building or structure has been completed and the owner has the use of it, he cannot rescind the contract and refuse to pay the contract price on the ground of defects in material or workmanship which were approved by his representative.<sup>95</sup> And if the purchaser of an article, finding it unsuitable for its intended use,

<sup>91</sup> *Hudson v. Roos*, 72 Mich. 363, 40 N. W. 467.

<sup>92</sup> *Grabill v. Barnhart Bros. & Spindler*, 160 Mich. 81, 125 N. W. 16.

<sup>93</sup> *Byers v. Chapin*, 28 Ohio St. 300.

<sup>94</sup> *Lawrence v. Dale*, 3 Johns. Ch. (N. Y.) 23.

<sup>95</sup> *Town of Packwaukee v. American Bridge Co.*, 183 Fed. 359, 105 C. C. A. 579.

sues the seller for damages, this amounts to a waiver of his right to rescind.<sup>96</sup>

If one who has undertaken to furnish a machine or a plant according to a contract and for a specified use, makes changes in the designs agreed on, or substitutes constituent parts differing from those specified in the contract, he does so at his own risk, and will be liable to lose the entire contract if such change or substitution results in making the work as a whole unsuitable for its intended purpose.<sup>97</sup> On the other hand, where a change of design is ordered by the purchaser of machinery, if it amounts to a different undertaking from the original one, the manufacturer may recover the reasonable value of his product, without regard to the contract price; but if the change does not amount to a new undertaking, he can recover only the contract price, so far as such price is applicable, together with a quantum meruit for extra labor and material necessitated by the change.<sup>98</sup>

§ 191. **Same; Warranty of Fitness for Prescribed Use.** A sale of personalty with a warranty of fitness for a prescribed use or of adaptability for a particular service may be treated as a sale on condition subsequent, at the election of the purchaser, and, on breach of the warranty, the property may be restored and the sale rescinded.<sup>99</sup> Thus, for example, where an agricultural implement is warranted to do good work, and it is found on trial that it will not answer the purpose for which it was sold, the purchaser may rescind the contract of purchase.<sup>100</sup> And in this case, where a thing is warranted as fit for a special purpose, it is not

<sup>96</sup> *El Campo Ice, Light & Water Co. v. Texas Machinery & Supply Co.* (Tex. Civ. App.) 147 S. W. 338.

<sup>97</sup> *Mt. Vernon Refrigerating Co. v. Fred W. Wolf Co.*, 188 Fed. 164, 110 C. O. A. 200.

<sup>98</sup> *Moran Bros. Co. v. Snoqualmie Falls Power Co.*, 29 Wash. 292, 69 Pac. 759.

<sup>99</sup> *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670; *Sherrill v. Coad*, 92 Neb. 406, 138 N. W. 567; *McCormick Harvesting Mach. Co. v. Knoll*, 57 Neb. 790, 78 N. W. 394; *Luitweller Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 16 Cal. App. 198, 116 Pac. 707, 712; *International Harvester Co. v. Porter*, 160 Ky. 509, 169 S. W. 993.

<sup>100</sup> *Gale Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 26 Pac. 8, 23 Am. St. Rep. 739.

necessary to show any fraud on the part of the seller in order to justify a rescission.<sup>101</sup>

§ 192. **Sale with Privilege of Return if not Satisfied.**—When a contract of sale reserves to the buyer the privilege of returning the article and annulling the sale if he is not “satisfied” with it, there has been much difference of opinion as to whether or not his mere declaration that he is dissatisfied will justify a rescission. According to one theory, such a clause in the contract gives the buyer the arbitrary and unrestricted right to reject the article, without assigning any reasons for his dissatisfaction or showing that it is at all reasonable or well-founded.<sup>102</sup> And though the reservation of a right to rescind in such manner or on such grounds is not very usual, yet it is not at all illegal.<sup>103</sup> According to another theory, the buyer cannot reject the article out of mere caprice or willfulness, but must have reasonable grounds for his dissatisfaction; or, in other words, if any reasonable and sensible person would have been satisfied with the article, the buyer cannot assert that he is not satisfied.<sup>104</sup>

Primarily, the question is one of construction, the object being to ascertain what the parties really intended at the time of making the contract. If the attending circumstances throw any light on this point, they must be taken into consideration, and may be decisive of the question. Thus, in a case in Michigan, it was said: “The cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes, and whether the particular case at any time falls within the one or the other must depend upon the special circumstances, and the question must be one of construction. In the one class, the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course,

<sup>101</sup> *Allen v. Hass*, 27 Ohio Cir. Ct. R. 727.

<sup>102</sup> *Coombs v. Glass*, 5 B. Mon. (Ky.) 11; *Taylor v. Trustees of Poor of Newcastle County*, 1 Pennewill (Del.) 555, 43 Atl. 613. And see other cases cited in this section.

<sup>103</sup> *Smalley v. Hendrickson*, 29 N. J. Law, 371.

<sup>104</sup> *Union League Club v. Blymyer Ice Mach. Co.*, 204 Ill. 117, 68 N. E. 409; *Clark v. Kelly* (Iowa) 109 N. W. 292. And see cases cited, *infra*, this section.

and a right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved, where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable. In the other class, the promisor is supposed to undertake that he will act reasonably and fairly and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness and the adequacy of the grounds of it, are open considerations and subject to the judgment of judicial triors." On these principles, it was held, in the case from which this quotation is taken, that where a contract for the sale of a machine was entered into with great reluctance by the vendee on the solicitation of the vendor's agent, and it appeared that the vendee would not enter into the agreement until the warranty of satisfaction had been inserted in it, the jury were justified in finding that the vendee had reserved the absolute right to reject the machine.<sup>105</sup>

<sup>105</sup> *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57.

But if the circumstances of the particular case fail to disclose anything positive in regard to the intention of the parties, the courts have felt obliged to consider the subject-matter of the contract, and find therein an answer to the question whether the purchaser's expressed dissatisfaction must be founded on reasonable grounds or may be entirely arbitrary. And first, where the contract calls for the delivery of an article to be specially made for the purchaser, or an article designed for his individual use or enjoyment, or an article primarily designed to please, and which may or may not please according to the taste and fancy of the individual, or the rendition of services which involve the expression of personality or the display of special gifts, and the purchaser or hirer agrees to accept and pay for the same only if "satisfactory" to him, it is held that this gives him the absolute and arbitrary right to reject the article or the services if he is not satisfied. It is not enough that he ought to be satisfied, or that reasonable persons would be satisfied in the circumstances. He is the sole judge, and is not even required to give reasons for his dissatisfaction or to show that any grounds therefor exist.<sup>106</sup> In one of the cases cited, it appeared that defendant engaged plaintiff to make a portrait of his daughter, under an agreement that he was not to be compelled to pay for it unless it was satisfactory to him. It was held that the defendant had the right to refuse the picture on the ground that it was not satisfactory, without giving any reasons why he was dissatisfied with it. The court said: "It may be that the picture was an excellent one, and that the defendant ought to have been satisfied with it and accepted it; but under the agreement

<sup>106</sup> *Giles v. Paxson* (C. C.) 40 Fed. 283; *Gray v. Central R. Co. of New Jersey*, 11 Hun (N. Y.) 70; *Silsby Mfg. Co. v. Town of Chico* (C. C.) 24 Fed. 893; *Hart v. Hart*, 22 Barb. (N. Y.) 606; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Barrett v. Raleigh Coal & Coke Co.*, 51 W. Va. 416, 41 S. E. 220, 90 Am. St. Rep. 802; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *McCarren v. McNulty*, 7 Gray (Mass.) 139; *Tyler v. Ames*, 6 Lans. (N. Y.) 280; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Baltimore & O. Ry. Co. v. Brydon*, 65 Md. 198, 611, 3 Atl. 306, 9 Atl. 126, 57 Am. Rep. 318; *Haney-Campbell Co. v. Preston Creamery Ass'n*, 119 Iowa, 188, 93 N. W. 297.

the defendant was the one person who had the right to decide this question. Where parties thus deliberately enter into an agreement which violates no rule of public policy, and which is free from the taint of fraud or mistake, there is no hardship whatever in holding them bound by it. Artists or third parties might consider the portrait an excellent one, but yet it might prove very unsatisfactory to the person who ordered it, although such person might be unable to point out with clearness or certainty the defects or objections; and if the person giving the order stipulates that the portrait, when finished, must be satisfactory to him, or else he will not accept it, and this is agreed to, he may insist upon his right as given him by the contract."<sup>107</sup> So, it is held that where a horse is sold with an agreement that the purchaser need not keep it unless it "suits" him or is "satisfactory" to him, the purchaser is not bound to be suited or satisfied because another person would be, but may be released from the contract on merely stating that he is not suited or satisfied, without giving reasons.<sup>108</sup>

With regard to contracts of employment, where the right is reserved to the employer to terminate the engagement if the services stipulated to be rendered are not satisfactory to him, it is held that he is not bound to state the reasons for his dissatisfaction, or to show that any third person would equally have been dissatisfied.<sup>109</sup> This is especially true (as stated above) where the services to be rendered involve the display of unusual gifts or the exercise of unusual skill. Thus, where one was engaged to take part as a singer in a theatrical performance, and the contract provided that he might be discharged by the manager if, in the latter's estimation, his services should not be "satisfactorily rendered," it was held that he might be discharged at any time without the manager's giving any reason therefor, and the question whether his services were or should have been satisfactory should not be left to the jury.<sup>110</sup> And the same rule applies,

<sup>107</sup> *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351.

<sup>108</sup> *Housding v. Solomon*, 127 Mich. 654, 87 N. W. 57; *Lyons v. Stills*, 97 Tenn. 514, 37 S. W. 280.

<sup>109</sup> *Hess v. Roberts*, 124 App. Div. 328, 108 N. Y. Supp. 894; *Magee v. Scott & Holston Lumber Co.*, 78 Minn. 11, 80 N. W. 781.

<sup>110</sup> *Peverley v. Poole*, 19 Abb. N. C. (N. Y.) 271.

for the same reason, to contracts with actors and actresses, where a similar reservation of the right to terminate the employment is made.<sup>111</sup>

When the subject of sale is a machine or any mechanical device or appliance, and the condition is that it shall "satisfy" the purchaser or operate "satisfactorily," the cases are quite generally agreed in holding that this reservation does not merely mean that the machine should be a good one and do good work, which would be satisfactory to reasonable men using machinery, but it means that the purchaser has an option to accept or reject it, according as it does or does not give him satisfaction, as tested solely by his own judgment.<sup>112</sup> But even in this case, according to some of the authorities, the purchaser cannot reject the article out of mere caprice or a senseless or pretended dissatisfaction. In a case in Vermont, a dairyman ordered certain pans, to be paid for if he was satisfied with them. In an action to recover the price, it was said: "We think the ruling of the court that the defendant had no right to say arbitrarily and without cause that he was dissatisfied, and would not pay for the pans, was sensible and sound. The pans were made with appliances to graduate the temperature of the milk by running water, and in that consisted their excellence. Without these they were like other pans, save their greater capacity. All this the defendant well knew. If a man orders a garment made of given material and fashion, and promises to pay if satisfied, he cannot say that the garment in material and manufacture is according to the order, and yet refuse to test the fit or pay for it. He must act honestly and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject-matter, and sur-

<sup>111</sup> *Parker v. Hyde & Behman Amusement Co.*, 53 Misc. Rep. 549, 103 N. Y. Supp. 731.

<sup>112</sup> *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528; *Plano Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. 841; *Gray v. Central R. Co. of New Jersey*, 11 Hun (N. Y.) 70; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *Stutz v. Loyal-Hanna Coal & Coke Co.*, 131 Pa. 267, 18 Atl. 875; *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; *Haney-Campbell Co. v. Preston Creamery Ass'n*, 119 Iowa, 188, 93 N. W. 297.



rounding circumstances. His dissatisfaction must be actual, not feigned.”<sup>113</sup> But a sale of a machine “if it is satisfactory *or* does what is claimed for it” is obligatory on the buyer if the machine answers the warranty as to performance, whether the buyer is satisfied or not.<sup>114</sup>

Where the subject of sale is real estate, and the condition is that the purchaser shall be satisfied with the title to the property, the rule is somewhat different. Here he has no arbitrary right to reject, but must show a substantial reason for refusing to complete the sale. In other words, if he is offered a good and marketable title, free from all reasonable objections or criticisms, he is bound to be satisfied with it, and his mere assertion that he is not satisfied, not pointing out any defect or sensible ground of doubt, is of no avail.<sup>115</sup> In such a case, “the law will determine for the defendant when he ought to be satisfied.”<sup>116</sup> In another case it was said: “In sales of real estate, if a party contracts to sell a given piece of realty, and to convey a good and satisfactory title, the contract is met if the title conveyed is sufficient, and the vendee cannot nullify the contract by claiming that he is not satisfied, or by alleging frivolous exceptions to the chain of title. The rulings in these and similar classes of cases go upon the principle that the contracts of the parties must be reasonably construed; and, so construing them, it is held that all the one party has the right to demand of the other is such a performance of the contract as is reasonable in view of the subject of the contract.”<sup>117</sup> But there are also a few cases which maintain that the purchaser is not bound to accept a title with which he is honestly dissatisfied, however unfounded his objections may be. These authorities rule that, while a fraudulent motive on the part of the purchaser would not be countenanced, yet the test of

<sup>113</sup> *Daggett v. Johnson*, 49 Vt. 345. And see *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207.

<sup>114</sup> *Clark v. Rice*, 46 Mich. 308, 9 N. W. 427.

<sup>115</sup> *Moot v. Business Men's Inv. Ass'n*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; *Pennington v. Howland*, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774; *Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829; *Taylor v. Williams*, 45 Mo. 80.

<sup>116</sup> *Folliard v. Wallace*, 2 Johns. (N. Y.) 395.

<sup>117</sup> *Giles v. Paxson* (C. C.) 40 Fed. 283.

his right to rescind is his good faith, and not the reasonableness of his dissatisfaction.<sup>118</sup> And it may be evident from the terms of the contract or the surrounding circumstances that it was the intention of the parties to permit a rejection of the title offered on a simple expression of dissatisfaction with it, without giving reasons, which intention will of course govern.<sup>119</sup>

There is another class of cases in which it is held that a contract, agreed to be completed to the "satisfaction" of a party, cannot be repudiated on a merely arbitrary expression of dissatisfaction, but only on showing a dissatisfaction which is reasonable and well-founded. These are cases in which the other party would suffer irreparable loss by the failure of the contract, or could not be restored to his former situation. "If one is induced to expend money or labor in the production of some article, or in the improvement of another's property, under a contract which binds him to do the work in a satisfactory manner, the one party cannot ordinarily retain the benefit of what has been done, and yet repudiate the obligation to pay therefor, by merely claiming that the contract has not been performed in a manner satisfactory to him. If the work or labor has been reasonably performed, according to the terms of the contract, it is held that the party is bound to be satisfied therewith because he has received all he contracted for."<sup>120</sup> Thus, where a contractor agrees to furnish the material and to erect on the land of a municipal corporation a garbage furnace, according to plans and specifications, which are a part of the contract, and warrants its capacity to consume a named quantity of garbage without emitting offensive odors, to be paid for when completed and tested to the satisfaction of a committee of the town council, and the contractor performs the contract according to the plans and specifications, and, the test being made, the furnace is shown to have the capacity warranted, and in all things to comply with the contract, the committee cannot defeat the contractor's right of recov-

<sup>118</sup> *Lieberman v. Beckwith*, 79 Conn. 317, 65 Atl. 153, 8 Ann. Cas. 271; *Sanger v. Slayden*, 7 Tex. Civ. App. 605, 26 S. W. 847.

<sup>119</sup> *Giles v. Paxson* (C. C.) 40 Fed. 283.

<sup>120</sup> *Giles v. Paxson* (C. C.) 40 Fed. 283.

ery by capriciously and unreasonably refusing to express its satisfaction with the work.<sup>121</sup> On the same principle, where a heating apparatus satisfactory to the promisor was to be furnished, it was held that the satisfaction was to be "determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant." And in reaching this conclusion, the court was influenced somewhat by the fact that the consideration furnished "was of such a nature that the value will be lost to the plaintiff either wholly or in great part" by a different construction.<sup>122</sup> In another case, the plaintiff by contract agreed to alter certain boilers in a manner specified, the stipulated price for the work to be paid by the defendants as soon as they were satisfied that the boilers as changed were successful. It was held that a simple allegation of dissatisfaction on the part of the defendants, without a good reason, was no defense to an action for the price.<sup>123</sup> And again, "satisfaction," as used in a contract providing that work shall be done to the satisfaction of the architect, means a legal satisfaction; and though the architect capriciously and arbitrarily refuses to be satisfied, yet if the work has been performed substantially in compliance with the contract, the law will hold the architect to be satisfied.<sup>124</sup> And in a railroad construction contract, an agreement to do the work to the "full satisfaction" of the company does not of itself give the company power arbitrarily to rescind the contract, but means that the work must be done to its satisfaction, not unreasonably withheld.<sup>125</sup> So, a contract to instal a patent passenger elevator which is "warranted satisfactory in every respect," means satisfactory to the purchaser, and though a bona fide

<sup>121</sup> *Parlin & Orendorff Co. v. City of Greenville*, 127 Fed. 55, 61 C. C. A. 591.

<sup>122</sup> *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422.

<sup>123</sup> *Duplex Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709.

<sup>124</sup> *Pollock v. Pennsylvania Iron Works Co.*, 13 Misc. Rep. 194, 34 N. Y. Supp. 129. Compare *Harder v. Marion County Com'rs*, 97 Ind. 455.

<sup>125</sup> *Lee v. New Haven, M. & W. R. Co.*, Fed. Cas. No. 8,197.

objection by him to its working will be a sufficient defense to an action for the price, yet he cannot reject it out of mere caprice.<sup>126</sup> In another case, the contract sued on was for staining and rubbing the woodwork in two houses owned by defendant. The work was to be done in the best workmanlike manner and to the "entire satisfaction" of the owner. The court held that if it was done in the best workmanlike manner, the owner could not defeat recovery of the price agreed to be paid by arbitrarily and unreasonably declaring that it was not done to his satisfaction.<sup>127</sup> But the rule stated in these cases sometimes comes into conflict with the rule set forth above, that articles designed primarily to satisfy the taste, liking, or individual judgment of the person for whom they are made must be absolutely satisfactory to him or else they may be rejected. Thus, in a case in Massachusetts, the plaintiff agreed to make and deliver to the defendant a suit of clothes, which were to be made to the defendant's satisfaction. It was held that the latter had the absolute right to refuse the suit if he was not satisfied with it, and that his reasons for so refusing could not be required of him.<sup>128</sup>

It is also necessary to distinguish carefully between a written guaranty that the article in question will give satisfaction and an oral representation that it will do so. Both are expressions of opinion as to something to occur in the future. But a representation of that kind gives no right of rescission, whereas a guaranty to that effect becomes a part of the contract, and if the purchaser is not satisfied, he may rescind for the breach of the contract.<sup>129</sup> In any event, where such a right of rejection is reserved, and the purchaser wishes to avoid liability for the price, he is bound to make some sort of test, trial, or at least inspection to determine the unsatisfactory character of the article, to give unequivocal notice of his dissatisfaction and rejection of it,

<sup>126</sup> *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207.

<sup>127</sup> *Doll v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398.

<sup>128</sup> *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463.

<sup>129</sup> *Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co.*, 242 Ill. 88, 89 N. E. 723.

and to return or offer to return the article with reasonable promptness.<sup>180</sup> If a vendee accepts, after a fair trial, an article sold under an agreement that he may return it if unsatisfactory, he cannot afterwards rescind the contract.<sup>181</sup>

**§ 193. Allowance for Tare, Tret, Leakage, etc.**—A deficiency in the quantity or quality of that which is the subject of a contract of sale is not ground for rescinding the contract when it results only from such circumstances as the allowance for tare or tret, unavoidable leakage, accidents in transportation, or such other causes as are usually and commercially taken into consideration and allowed for. Thus, where casks of water were packed in a foreign country, in casks of one hundred stone jugs to each, and it is shown that such casks cannot be transported without some breakage of the jugs, this circumstance must be considered as having entered into the contract, and if the actual breakage is not beyond what is usual, the buyer cannot refuse to receive the consignment and rescind the contract.<sup>182</sup> On somewhat similar principles, where a merchant directs another to have shipped to him corn of a certain grade, over a certain railroad, the weight and grade to be evidenced by an official certificate, the fact that the corn while in transit becomes heated will not excuse the vendee from payment of the price.<sup>183</sup>

**§ 194. Offer or Opportunity to Make Good Defect.**—Numerous decisions maintain the rule that a buyer is not justified in rescinding the contract on account of deficiency in quantity or quality of the goods delivered, when the defect can be remedied, the deficiency supplied, or the inferior portion of the goods replaced by others, and the seller offers to do so and has the ability to do so, and will act within a

<sup>180</sup> *Waters Heater Co. v. Mansfield*, 48 Vt. 378; *Dewey v. Borough of Erie*, 14 Pa. 211, 53 Am. Dec. 533; *Avery v. Cullen*, 15 Cal. App. 413, 114 Pac. 1022; *Rose v. Monarch*, 150 Ky. 129, 150 S. W. 56, 42 L. R. A. (N. S.) 660, 667.

<sup>181</sup> *McGill v. Hall* (Tex. Civ. App.) 26 S. W. 132.

<sup>182</sup> *Hays v. Smith, McGloin* (La.) 193.

<sup>183</sup> *Champlin v. Church*, 76 N. J. Law, 553, 70 Atl. 138, 19 L. R. A. (N. S.) 261.

reasonable time.<sup>184</sup> But this rule has been denied,<sup>185</sup> the cases holding that the consent of both parties to any modification of a contract of sale, or to the substitution of satisfactory goods for those found to be inferior, is just as necessary as it is to the making of the original contract.<sup>186</sup> In a case in Michigan, a person ordered a monument with certain inscriptions to be erected in his cemetery lot, but when it was set up, it was discovered that a material part of the inscription had been omitted. The makers were notified of the defect and proposed to remedy it, but the purchaser declined this proposition, and declared the order rescinded. The makers insisted on their right to furnish another monument, but when the second arrived it was found to be broken, and the purchaser forbade the erection of it. Afterwards a third monument was sent and was set up without the purchaser's knowledge. The contract provided that the makers should furnish the monument as soon as convenient, but not that they should be allowed to remedy defects, or furnish another monument in case the first failed to meet the requirements. It was held that, inasmuch as the defect in the first monument was admitted, the contract was at an end when the purchaser refused to accept it, and that he was not obliged to accept another.<sup>187</sup> In another case, the contract called for a completed windmill, the work and material guaranteed first-class, and after construction the mill was rejected because the tower was too slight to support the tank, and the builder was notified to remove it, despite his offer to put up another tower. It was held that, the defect being material, the purchaser had the right to terminate the contract and require the removal of the mill, without regard to the seller's offer.<sup>188</sup> There are even some cases

<sup>184</sup> *Clark v. Wheeling Steel Works*, 53 Fed. 494, 3 C. C. A. 600; *Vallens v. Tillmann*, 103 Cal. 187, 37 Pac. 213; *Bender v. Lundberg*, 152 Ill. App. 326; *Black v. Herbert*, 111 Mich. 638, 70 N. W. 138; *Baylis v. Weilbezahl*, 42 Misc. Rep. 178, 85 N. Y. Supp. 355; *Githens v. Zorn*, 1 Wkly. Notes Cas. (Pa.) 118; *Gelser Mfg. Co. v. Lunsford* (Tex. Civ. App.) 139 S. W. 64.

<sup>185</sup> *Russell & Co. v. Hudson* (Tenn. Ch. App.) 37 S. W. 1001.

<sup>186</sup> *Woodward v. Libby*, 58 Me. 42.

<sup>187</sup> *American White Bronze Co. v. Gillette*, 88 Mich. 231, 50 N. W. 136, 26 Am. St. Rep. 286.

<sup>188</sup> *Fisher v. Goodrich*, 61 App. Div. 534, 70 N. Y. Supp. 38.

holding that, where the contract contains an undertaking on the part of the seller to replace any article found to be defective or unsatisfactory, still the purchaser is not bound to accept another article offered in place of the one first delivered, but may return what has been delivered and rescind the contract.<sup>139</sup> This, however, has been denied. In a case in Iowa, a written warranty of a machine provided that if it did not work satisfactorily or was defective, it should be returned and the payments refunded, or another machine supplied that would fill the warranty. Upon the return of the machine by the purchaser as defective, he demanded the unconditional return of his money. But it was held that the vendor had the option either to return the money or to supply another machine, and that a return and demand which did not give him the opportunity to exercise this option was not effective as a rescission of the contract.<sup>140</sup> But after the buyer of a machine has definitely rescinded the purchase, for failure of the machine to conform to the contract, no subsequent act of the seller in so rebuilding the machine as to make it conform to the terms of the sale will bind the buyer.<sup>141</sup>

Whatever may be the correct rule for this class of cases, the right of the buyer to rescind for inferiority or defects is unquestioned where the seller definitely refuses to make good the defects on being notified thereof,<sup>142</sup> or where he delays his efforts to remedy the matters objected to for an unreasonable length of time,<sup>143</sup> or until after the buyer has made other arrangements and supplied the place of the rejected article,<sup>144</sup> or where the seller's offer to make good comes at an unsuitable time, and a time when no sufficient test can be made of the efficiency of the article as repair-

<sup>139</sup> *Bracken v. Fidelity Trust Co.*, 42 Okl. 118, 141 Pac. 6, L. R. A. 1915B, 1216; *Bixler v. Dollevé* (Tex. Civ. App.) 167 S. W. 1102.

<sup>140</sup> *Pitt's Sons' Mfg. Co. v. Spitznogle*, 54 Iowa, 36, 6 N. W. 71.

<sup>141</sup> *Greene v. Curtis Automobile Co.*, 144 Wis. 493, 129 N. W. 410.

<sup>142</sup> *W. F. Main Co. v. Field*, 144 N. C. 307, 56 S. E. 943, 11 L. R. A. (N. S.) 245.

<sup>143</sup> *Pittsburg Gas Engine Co. v. South Side Electric Mfg. Co.*, 43 Pa. Super. Ct. 485; *Tufts v. Hunter*, 63 Minn. 464, 65 N. W. 922.

<sup>144</sup> *Helm v. Loveland*, 136 Iowa, 504, 113 N. W. 1082.



ed,<sup>145</sup> or where the seller's attempts to correct the fault or make good the defect are unsuccessful,<sup>146</sup> or where he offers to supply another article in place of that rejected, but demands more money for it than was originally stipulated to be paid,<sup>147</sup> or where the sale was induced by fraudulent misrepresentations as to the quality and value of the property sold.<sup>148</sup> But where goods are sold with a representation of good quality, and, on complaint as to their quality by customers of the buyer, to whom the goods were shipped without inspection, the seller agrees to make allowance therefor by credit on the account, this agreement is based on a sufficient consideration, and, if accepted by the buyer, will of course preclude rescission.<sup>149</sup>

Some contracts of sale, particularly in the case of machinery, contain provisions requiring the purchaser, in case the article proves defective or unsatisfactory, to give notice thereof to the seller, and afford the latter an opportunity to remedy the defect or replace the faulty article with a perfect one. These conditions are regarded by the courts as reasonable and proper, and a purchaser, taking property under such a contract, must at least substantially comply with what is required of him, in the way of giving notice and according an opportunity for adjustment or replacement, before he can claim the right to rescind.<sup>150</sup> And if he specifies certain defects, and they are remedied, he cannot afterwards rescind on account of further objections known to him at the time but not insisted on.<sup>151</sup> On the other hand, if the purchaser gives due notice of defects and proper time is allowed for them to be remedied, but this is not done, he

<sup>145</sup> *J. I. Case Threshing Mach. Co. v. Puls*, 175 Ill. App. 190.

<sup>146</sup> *Cole v. Laird*, 121 Iowa, 146, 96 N. W. 744.

<sup>147</sup> *Desson v. Antony* (Com. Pl.) 13 N. Y. Supp. 890.

<sup>148</sup> *Lyon v. Lindblad*, 145 Mich. 588, 108 N. W. 969.

<sup>149</sup> *B. F. Coombs & Bro. Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

<sup>150</sup> *Huber Mfg. Co. v. Piersall*, 150 Ky. 307, 150 S. W. 341; *Plano Mfg. Co. v. Kesler*, 15 Ind. App. 110, 43 N. E. 925; *Sandwich Mfg. Co. v. Feary*, 34 Neb. 411, 51 N. W. 1026; *Northwest Thresher Co. v. Mehlhoff*, 23 S. D. 476, 122 N. W. 428. Compare *Housding v. Solomon*, 127 Mich. 654, 87 N. W. 57.

<sup>151</sup> *Miller-Stone Mach. Co. v. Balfour*, 25 Tex. Civ. App. 413, 61 S. W. 972.

will then have a reasonable time in which to return the article and cancel the sale.<sup>152</sup>

§ 195. **Acceptance and Use of Defective Article.**—If an article delivered in pursuance of a contract of sale is defective, or inferior in quality to that which was contracted for, but the buyer nevertheless uses it and treats it as his own, or retains it for an unreasonable length of time in his use and possession, without notifying the seller of his objections to it, this will amount in law to a waiver of such objections and will preclude the buyer from afterwards rescinding the sale.<sup>153</sup> An exception to this rule, however, may be found in the case where the buyer's retention and use of the article are induced by the seller's repeated promises to make it good. Thus, a machine having been bought under a contract which provided that, if it was defective, it might be returned at the end of the season, but not afterwards, the buyer retained it until the next season, although he knew it to be defective, upon the promise of the seller's agent that it should be made to do good work then. It was held that this was not a new contract (which the agent might not have authority to make), but only a waiver of the provision in the original contract, and that the purchaser might afterwards sue thereon.<sup>154</sup> And further, though the buyer's retention and use of the article may prevent him from rescinding, it does not follow that he is without remedy for the breach of contract. Thus, where plaintiff sold cattle to defendant, who gave notes therefor and further agreed to furnish plaintiff certain quantities of fresh milk, and by a subsequent agreement plaintiff agreed to allow a rebate of \$300 if the defendant should faithfully perform his contract, it was held that the plaintiff did not, by accepting and using the milk each day, waive his right to refuse

<sup>152</sup> Selberling v. Brauer, 24 Neb. 510, 39 N. W. 591.

<sup>153</sup> Henderson Elevator Co. v. North Georgia Milling Co., 126 Ga. 279, 55 S. E. 50; Kerr v. Smith, 5 B. Mon. (Ky.) 552; Stone v. Russell, 13 Ky. Law Rep. 970; Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co., 60 Mo. App. 168; Acme Harvester Co. v. Carroll, 80 Neb. 594, 114 N. W. 780; Northwest Thresher Co. v. Mehlhoff, 23 S. D. 476, 122 N. W. 428. And see, *infra*, §§ 595, 596.

<sup>154</sup> Osborne v. Flood, 11 Ill. App. 408.

the rebate on account of defendant's breach of the contract in furnishing milk which was unfit for use.<sup>155</sup> In another case, the seller of a machine agreed to give to the purchaser a satisfactory bond to indemnify him against interference by one who claimed that the machine was an infringement on his patent. And it was held that, after the buyer had used the machine for several months, though he could not then insist on such a bond as a condition precedent to his liability for the price, still he could recoup the damages sustained by the seller's failure to give it.<sup>156</sup>

<sup>155</sup> *Carpenter v. Crow*, 77 Ark. 522, 92 S. W. 779.

<sup>156</sup> *Young Bros. Machine Co. v. Young*, 111 Mich. 118, 69 N. W. 152.

## CHAPTER VIII

## FAILURE, REFUSAL, OR IMPOSSIBILITY OF PERFORMANCE.

- § 196. Non-Performance as Ground of Rescission.
- 197. Pre-Requisites to Rescission.
- 198. Partial or Successive Failures of Performance.
- 199. Performance Not in Accordance with Terms.
- 200. Defective or Unsatisfactory Performance of Work.
- 201. Excuses for Default.
- 202. Refusal of Performance.
- 203. Anticipatory Breach of Contract.
- 204. Declared Intention Not to Perform.
- 205. Performance Prevented by Wrongful Act of Other Party.
- 206. Inability to Perform.
- 207. Insolvency of Purchaser.
- 208. Impossibility of Performance.
- 209. Same; Destruction or Perishing of Subject-Matter.
- 210. Effect of Party's Disabling Himself to Perform.
- 211. Sale of Subject-Matter to Third Party.
- 212. Breach of Covenant or Condition, in General.
- 213. Same; Conditions Subsequent; Promise of Future Action.
- 214. Non-Payment of Consideration.
- 215. Payment or Delivery in Installments.
- 216. Failure of Punctual Performance; Time of the Essence.
- 217. Same; Failure to Deliver or Perform at Time Stipulated.
- 218. Same; Unreasonable Delay in Delivery or Performance.
- 219. Same; Waiver or Extension of Time.
- 220. Same; Penalty Fixed for Delay.

§ 196. Non-Performance as Ground of Rescission.—The mere breach of a contract does not amount to fraud, nor is it proof of fraud existing at the time the contract was made, and neither knowledge of one's inability to perform a contract nor an intention not to perform it will make the transaction fraudulent.<sup>1</sup> But aside from questions of fraud, it is a general rule that if a contract is entire and remains executory in whole or in part, and one party fails to perform what it is his duty to do under the contract, and the other party is not in default, the latter may rescind the contract.<sup>2</sup>

<sup>1</sup> *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735; *John Blaul & Sons v. Wandel*, 137 Iowa, 301, 114 N. W. 899.

<sup>2</sup> *Skillern v. May*, 4 Cranch, 137, 2 L. Ed. 574; *Fore River Shipbuilding Co. v. Southern Pac. Co.*, 219 Fed. 387, 135 C. C. A. 129; *Martin v. Chapman*, 6 Port. (Ala.) 344; *Bacon v. Green*, 36 Fla. 325, 18 South. 870; *Brewster v. Van Liew*, 20 Ill. App. 43; *Cromwell v.*

Thus, for example, when a contract for the sale of a chattel is broken by the failure of the vendor to deliver it, and the purchaser has paid the price in advance, he may elect to rescind the contract and recover the money advanced, with interest.<sup>3</sup> So, where the vendee under an unexecuted contract for the sale of land has paid the whole or a part of the purchase money, and the vendor fails to complete his engagement, the vendee may disaffirm the contract and bring an action for money had and received.<sup>4</sup> And where a grantor orally agreed to convey land and put the grantee in possession, the latter is entitled to rescind the contract because of the failure of the grantor to put him in possession.<sup>5</sup> And in a contract for the sale of first-rate land, to be chosen by the purchaser out of several tracts owned by the vendor, the vendor is the agent to do the first act, by exhibiting the lands from which the choice is to be made, and on his failure to do this, the contract may be rescinded.<sup>6</sup> Conversely, if a purchaser of real estate fails to comply with the terms of the contract under which he obtained possession, the vendor is at liberty to treat the contract as rescinded, and to regain the possession by ejectment.<sup>7</sup> In Louisiana, there is a special statutory rule as to contracts of

*Wilkinson*, 18 Ind. 365; *Edmonds v. Cochran*, 12 Iowa, 488; *Lytle v. Breckenridge*, 3 J. J. Marsh. (Ky.) 663; *Church of St. Louis v. Kirwan*, 9 La. Ann. 31; *Dodge v. Greeley*, 31 Me. 343; *Moore v. Curry*, 112 Mass. 13; *Seymour v. Detroit Copper Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; *City of Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075; *Townsend v. Hurst*, 37 Miss. 679; *Pierce v. Duncan*, 22 N. H. 18; *Weaver v. Bentley*, 1 Caines (N. Y.) 47; *Hadden v. Dimick*, 13 Abb. Prac. N. S. (N. Y.) 135; *Stelger v. London*, 141 App. Div. 382, 126 N. Y. Supp. 256; *Dula v. Cowles*, 52 N. C. 290, 75 Am. Dec. 463; *Enderlien v. Kulaas*, 25 N. D. 385, 141 N. W. 511; *Heller v. Charleston Phosphate Co.*, 28 S. C. 224, 5 S. E. 611; *School District No. 1 v. Hayne*, 46 Wis. 511, 1 N. W. 170.

<sup>3</sup> *Dobenspeck v. Armel*, 11 Ind. 31; *Phillips v. Bruce*, Anth. N. P. (N. Y.) 80.

<sup>4</sup> *Seibel v. Purchase* (C. C.) 134 Fed. 484; *Scarborough v. Arrant*, 25 Tex. 129; *Smith v. Lamb*, 26 Ill. 396, 79 Am. Dec. 381. But see *Shoup v. Cook*, *Smith* (Ind.) 29.

<sup>5</sup> *Biewer v. Mueller*, 254 Ill. 315, 98 N. E. 548.

<sup>6</sup> *Lynch v. Johnson*, 2 Litt. (Ky.) 98.

<sup>7</sup> *Burnett v. Caldwell*, 9 Wall. 290, 19 L. Ed. 712; *Waters v. Pearson*, 163 Iowa, 391, 144 N. W. 1026; *Drew v. Smith*, 7 Minn. 301 (Gil. 231).

sale, as follows: "If a promise to sell has been made with the giving of earnest, each of the contracting parties is at liberty to recede from the promise; to wit, he who has given the earnest, by forfeiting it; and he who has received it, by returning the double."<sup>8</sup>

But this rule is by no means limited to contracts for the sale of real or personal property, but it extends to all forms of contract which involve reciprocal or concurrent action by the two parties. For instance, a person agreed to teach another the art of telegraphy until he should become proficient, but after receiving full payment, he abandoned the contract and would not give the stipulated instruction; and it was held that the student could treat the action as a rescission and sue for the amount paid.<sup>9</sup> So, the breach of an agreement to maintain and care for a man and his wife relieves them from the performance of their part of the agreement to give the other party the benefit of an insurance on the man's life.<sup>10</sup> And where defendant contracted with plaintiff to keep cut a supply of logs sufficient to keep employed plaintiff's teams until defendant's timber was all hauled, his failure to do so will be a violation of the contract justifying its abandonment by the plaintiff.<sup>11</sup> On similar principles, under a contract for the transportation of a quantity of iron by the defendant for the plaintiff, the plaintiff failed to deliver the iron to the defendant within the time specified in the contract, and it was held that this justified the defendant in rescinding or abandoning the contract.<sup>12</sup>

<sup>8</sup> Rev. Civ. Code La., art. 2463. See *Legier v. Braughn*, 123 La. 463, 49 South. 22. An agreement for the sale of real estate, contemplating the passing of property by an act to be executed at a later date, and which in other respects contains the elements essential to a sale, is a promise of sale, and when made with the giving of earnest, may be receded from by the party receiving the earnest by returning the double. *Smith v. Hussey*, 119 La. 32, 43 South. 902.

<sup>9</sup> *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379.

<sup>10</sup> *Ptacek v. Pisa*, 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537; *Young v. Young*, 157 Wis. 424, 147 N. W. 361.

<sup>11</sup> *Fletcher v. Verser*, 79 Ark. 271, 96 S. W. 384.

<sup>12</sup> *Farwell v. Davis*, 66 Barb. (N. Y.) 73.

Where one of the parties to a contract repudiates it, that is, either expressly or tacitly refuses to go on with it or to perform his part of it or to recognize it as binding on him, this will give the other party (not being in default) the right to rescind that contract and to be restored to his former status as to anything he may have already done under it.<sup>13</sup> And continued non-action by a party, where the contract requires him to act periodically or at stated intervals, may be evidence of his repudiation of the contract, as, for instance, where he has bound himself to order from the other party, and to receive and pay for, a stated quantity of a given commodity at regular intervals, and fails to do what is required of him.<sup>14</sup> But the total repudiation of a contract cannot be predicated on the act of a party in merely disputing the quality, grade, weight, etc., of commodities delivered in pursuance of it.<sup>15</sup> Similar to this is the case of the abandonment of a contract, that is, the act of one who, having entered upon the performance of the contract, afterwards fails or neglects to perform such further acts as the contract requires him to do. If such abandonment is complete and is continued for such a length of time as to evince a purpose not to resume or complete the contract, it furnishes ground for rescission by the other party.<sup>16</sup>

Still another case of non-performance justifying rescission is that in which a party, having gained possession or control of the subject-matter of the contract, employs it in a different manner, or perverts it to a different use, than that contracted for. Thus, if defendant contracts to loan to plaintiff funds with which to make certain improvements, plaintiff's misappropriation of funds so advanced, by diverting them to uses other than those contemplated by the contract, constitutes such a breach of it as to justify the defendant in rescinding and refusing further performance.<sup>17</sup>

<sup>13</sup> *Alpena Portland Cement Co. v. Backus*, 156 Fed. 944, 84 O. C. A. 444; *Cook v. Hamilton County Com'rs*, 6 McLean, 112, Fed. Cas. No. 3,157; *Ballou v. Billings*, 136 Mass. 307; *Schwear v. Haupt*, 49 Mo. 225.

<sup>14</sup> *Jung Brewing Co. v. Konrad*, 137 Wis. 107, 118 N. W. 548.

<sup>15</sup> *Hartnett v. Baker*, 4 Pennewill (Del.) 431, 56 Atl. 672.

<sup>16</sup> *Cringan v. Nicolson*, 1 Hen. & M. (Va.) 429.

<sup>17</sup> *Bixby-Thelsen Co. v. Evans*, 174 Ala. 571, 57 South. 39. But see



So, in a case in the federal courts, the owner of a stock farm made a contract with defendant, giving him possession of the farm, and the right to one-third of the profits he should make. But the defendant sold the stock and leased the farm, retaining only the homestead, became insolvent, and unable to repay the money he had received. It was held that the owner was entitled in equity to a decree setting aside the contract and restoring the possession to him.<sup>18</sup> So a complaint alleging a breach by defendant of a contract whereby plaintiff was to furnish lands and implements, and defendant was to devote his time to raising alfalfa and feeding cattle to be furnished by plaintiff and defendant respectively, the title to the cattle to remain in the person furnishing them, and which further alleges that defendant has placed his own brand on cattle supplied by the plaintiff, and has attempted to charge plaintiff for expenses not contemplated by the contract, and is incurring unnecessary expense and is insolvent, shows a cause of action for the rescission of the contract.<sup>19</sup> In a case in California, the plaintiff granted to defendant the exclusive right to sell a patented machine in certain states, with a provision for the termination of the agreement in case the defendant failed faithfully to prosecute the introduction and sale of the article. But the defendant made an agreement with the proprietor of a rival machine, intending to prevent the introduction and sale of the plaintiff's machine within at least a portion of the territory covered by the plaintiff's agreement, and he denied the plaintiff's right to terminate the agreement, and threatened to obtain an injunction to prevent sales by the plaintiff in that territory. It was held that this gave the plaintiff a right to sue for the cancellation of the agreement.<sup>20</sup> And a similar ruling was made in a case where one who had contracted with a transfer company to furnish a motor truck at an agreed price per

*Trinity University v. McFarland*, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1309.

<sup>18</sup> *Tibbatts v. Tibbatts*, 6 McLean, 80, Fed. Cas. No. 14,020.

<sup>19</sup> *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202.

<sup>20</sup> *Bradley v. Anglo-American Gas Control Co.*, 102 Cal. 627, 36 Pac. 1011.

day to carry baggage to certain hotels, proceeded to collect and retain the compensation. This was held such a breach of his contract as warranted its termination by the other party.<sup>21</sup> But the breach by a third person of his contract with the buyer of goods does not authorize the buyer to rescind the contract of sale. This ruling was made in a case where the buyer was selling the goods in retail lots to a third person, and the latter declined to receive any more on the ground that they were not of the stipulated quality.<sup>22</sup>

Finally, the non-performance of a contract by one of the parties may not only justify its rescission by the other, but may impose upon him a duty, in equity at least, to terminate it promptly. It is said that, because one party violates his contract, the other is not at liberty entirely to disregard his own interest, and then seek full indemnity by the recovery of damages against the defaulting party.<sup>23</sup>

**§ 197. Pre-Requisites to Rescission.**—Rescission of a contract is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat the very object of the contract.<sup>24</sup> But on the other hand, the motives of the party in default or the reasons which actuated him in acting or refraining from action are not important; and it is not essential to the right of one party to rescind a contract that its violation by the other should have been willful.<sup>25</sup> But while one may, by his own act, rescind a contract for failure of performance, and abide the consequences

<sup>21</sup> *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 139 Pac. 188.

<sup>22</sup> *Bristol Mfg. Corp. v. Arkwright Mills*, 213 Mass. 172, 100 N. E. 55.

<sup>23</sup> *Worth v. Edmonds*, 52 Barb. (N. Y.) 40.

<sup>24</sup> *Callanan v. Keeseville, A. O. & L. R. Co.*, 199 N. Y. 268, 92 N. E. 747; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701; *Umberg v. Neinken*, 128 App. Div. 165, 112 N. Y. Supp. 618; *MacCambridge v. Roth* (Sup.) 144 N. Y. Supp. 626; *Weintz v. Hafner*, 78 Ill. 27; *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090. Where a contract for the sale of land specifies what defaults shall be grounds for forfeiture, a forfeiture on other grounds not included therein will not be upheld. *Cughan v. Larson*, 13 N. D. 373, 100 N. W. 1088.

<sup>25</sup> *Bacon v. Green*, 36 Fla. 325, 18 South. 870.

of so doing, yet if he invokes the aid of a court of equity to obtain a rescission of it, he must be able to show that he has not an adequate remedy at law.<sup>26</sup> This may be the case, for example, where an action for damages would not be an adequate remedy for the reason that the damages resulting from the defendant's non-performance could not be ascertained with reasonable certainty.<sup>27</sup> But the mere loss of additional profits by reason of a breach of contract is not sufficient ground for rescission, when the amount is comparatively small and can be recovered in an action for damages.<sup>28</sup> On the other hand, the fact that a penalty for non-performance is named in the contract will not operate as a bar to a suit for rescission, where the amount of the penalty is not sufficient to give adequate damages at law.<sup>29</sup>

In practically all cases of rescission, restoration of the status quo is an essential pre-requisite to the right to rescind. And rescission for non-performance is no exception to this rule. If the situation of the parties has been so changed by a partial performance of the contract, or by their making arrangements for carrying it out, or by their actions taken in reliance upon its expected execution, that they cannot be restored without loss to their former situation, as if the contract had not been made, then a rescission cannot be had, but the remedy for damages occasioned by non-performance must be sought in some other form.<sup>30</sup>

<sup>26</sup> *Lewis v. New York Life Ins. Co.*, 181 Fed. 433, 104 C. C. A. 181, 30 L. R. A. (N. S.) 1202; *Blake v. Pine Mountain Iron & Coal Co.*, 76 Fed. 624, 22 C. C. A. 430; *Madson v. Clark*, 165 Ill. App. 228; *Carmody v. Powers*, 60 Mich. 26, 28 N. W. 801; *Callanan v. Keeseville, A. C. & L. R. Co.*, 199 N. Y. 268, 92 N. E. 747; *Fuller v. Hubbard*, 6 Cow. (N. Y.) 13, 16 Am. Dec. 423.

<sup>27</sup> *Callanan v. Keeseville, A. C. & L. R. Co.*, 199 N. Y. 268, 92 N. E. 747.

<sup>28</sup> *Southwestern Surety Ins. Co. v. Ferguson* (Tex. Civ. App.) 131 S. W. 662.

<sup>29</sup> *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796; *Ochs v. Kramer*, 32 Ky. Law Rep. 762, 107 S. W. 260.

<sup>30</sup> *Blake v. Pine Mountain Iron & Coal Co.*, 76 Fed. 624, 22 C. C. A. 430; *Ragsdale v. Ragsdale*, 105 La. 405, 29 South. 906. "In some cases a party may rescind without the consent of the opposite party, for non-performance by him of his covenants; but this can be done only when both parties can be restored to the condition in which

Thus, a sale cannot be annulled, for non-payment of a portion of the price, when the parties from their transactions have rendered it impossible to place each other in the same situation they were in before the sale was made.<sup>81</sup> In an instructive case on this point, it appeared that a railway company contracted with the plaintiff to furnish and put down a switch or siding leading into his coal yard from the main line of the railway. Relying on this contract, the plaintiff erected sheds and incurred other expenses in preparing the premises for a coal yard, and defendant railway built the siding and delivered coal over it for a time, but afterwards, on the ground that part of the contract price had not been paid, undertook to rescind the contract and to remove the siding. But it was held that this could not be allowed, since it would destroy the plaintiff's business, and that the remedy of the company was an action on the contract for the unpaid balance of the price.<sup>82</sup> And, to generalize the rule a little, rescission for non-performance cannot be claimed when there are circumstances in the particular case which would render such a course inequitable.<sup>83</sup>

It is also required of a party seeking the rescission of a contract that he should act with reasonable promptness, and he cannot claim relief in this form if he has acquiesced in the existing condition of affairs for so long a time that the rights or interests of the other party would be seriously compromised by a rescission, or until the rights of third persons have intervened. This rule is applicable in the case of rescission for non-performance.<sup>84</sup> Thus, a contract for the sale of land provided that the grantee should be entitled to a deed on making the first payment, but the deed was not then delivered, and he remained in possession of the land for eight years after making the first payment, and paid a large part of the purchase money without receiving a deed. It was held that he could not afterwards rescind

they were before the contract was made." Civ. Code Ga. 1910, § 4306.

<sup>81</sup> Leflore v. Carson, 7 La. Ann. 65.

<sup>82</sup> Smith v. Atlantic City R. Co., 78 N. J. Law, 708, 76 Atl. 977.

<sup>83</sup> Lipscomb v. Fuqua, 103 Tex. 585, 131 S. W. 1061.

<sup>84</sup> Hakes v. B. Aaron & Sons, 182 Ill. App. 100. See Miles v. Hemenway, 59 Or. 318, 111 Pac. 696, 117 Pac. 273.

the contract for the default of the grantor in not giving him a deed.<sup>85</sup>

Finally, where performance at an exact time is not of the essence of the contract, or where a provision as to the time of performance has been waived, it would not ordinarily be equitable to permit the party to terminate the contract abruptly and without any notice of his intention to do so. Hence it is usually required in such cases that he shall first put the other party in default, that is to say, by a demand for performance and by affording a reasonable opportunity for the fulfillment of the contract.<sup>86</sup>

**§ 198. Partial or Successive Failures of Performance.—**

A partial failure of performance of a contract will not give ground for its rescission unless it defeats the very object of the contract or renders that object impossible of attainment, or unless it concerns a matter of such prime importance that the contract would not have been made if default in that particular had been expected or contemplated. In an early and leading case it was said: "It is not every partial neglect or refusal to comply with some of the terms of the contract by one party which will entitle the other party to abandon at once the special and solemn obligation entered into by the parties, and by which they had made for themselves the law which was to control them. In order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself."<sup>87</sup> This rule is inflexible where the partial

<sup>85</sup> *Knickerbocker v. Harris*, 1 Paige (N. Y.) 209. But see this case on appeal, 5 Wend. 638.

<sup>86</sup> *Kent v. Davis Bros. Lumber Co.*, 122 La. 1046, 48 South. 451.

<sup>87</sup> *Selby v. Hutchinson*, 4 Gilman (9 Ill.) 319. And see *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 32 N. E. 773, 30 L. R. A. 33; *Bloomington Electric Light Co. v. Radbourn*, 56 Ill. App. 165; *Weintz v. Hafner*, 78 Ill. 27; *Perry v. Quackenbush*, 105 Cal. 299, 38

failure of performance is such as may be fully compensated in damages.<sup>38</sup> But the rule does not mean that the object of the contract should be defeated by one single and final act or neglect by the defaulting party. For the same result may follow from a continued succession of acts or neglects, each of which is of minor importance in itself, but which in the aggregate thwart the purpose of the other party in making the contract. For instance where a seller contracts to furnish to the buyer a large quantity of steel at a fixed price per pound, a certain quantity to be delivered each month, a casual error in the kind of steel delivered in some shipments, which the seller is able and willing to correct, will not give the buyer the right to rescind the contract, but where the errors are so numerous and persistent as to subject him to serious trouble, it will warrant a rescission on his part.<sup>39</sup>

But although a partial failure of performance may not be of such a nature as to defeat the whole purpose of the contract or render its completion by the other party impossible, yet it may furnish ground for rescission where it relates to a matter which enters into the very substance of the contract and constitutes an integral and important part of it.<sup>40</sup> The test, it is said, is to consider whether or not the matter in respect to which failure of performance occurs is of such a nature and of such importance that the contract would not have been made without it.<sup>41</sup> For instance, where it is made a part of a contract of sale that the seller shall give the buyer a bond to protect him against loss, or against claims for infringement of a patent, or to secure the faithful performance of the contract, this provision is a substantive part of the contract, and failure to

Pac. 740; *Miller v. Phillips*, 31 Pa. 218; *Peale v. Marian Coal Co.* (C. C.) 190 Fed. 376; *Hancock v. Tanner*, 4 Stew. & P. (Ala.) 262.

<sup>38</sup> *Gatlin v. Wilcox*, 26 Ark. 309.

<sup>39</sup> *Miller v. Benjamin*, 67 Hun, 650, 21 N. Y. Supp. 1116.

<sup>40</sup> *Ballance v. Vanuxem*, 191 Ill. 319, 61 N. E. 85; *Light, Heat & Water Co. v. City of Jackson*, 73 Miss. 598, 19 South. 771; *Rownd v. Hollenbeck*, 77 Neb. 120, 108 N. W. 259; *Jackson v. Butler*, 21 Tex. Civ. App. 379, 51 S. W. 1095; *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781.

<sup>41</sup> *Moreau v. Chauvin*, 8 Rob. (La.) 157.

furnish the bond is ground for rescission.<sup>42</sup> This rule has also been applied in the case of failure to comply with that part of a contract which obliges the vendor of land to furnish an abstract of title,<sup>43</sup> to obtain an extension of an existing mortgage on the premises,<sup>44</sup> or to secure the removal of a lien.<sup>45</sup> So, where the plaintiff agreed to donate certain land to defendants on condition that they should conduct a summer school at the place where the land lay, for a period of three years, and also, within that time, erect and pay for all such buildings as should be needed for the purpose, and they complied with the contract so far as to conduct the school, but erected no buildings, the school being carried on in buildings belonging to other parties, it was held that the plaintiff was entitled to a decree annulling the contract.<sup>46</sup> So an agreement to instruct the plaintiff in the science and art of aviation is an indivisible contract, such that, on defendant's failure to give or complete instruction as to the construction of the machine, the plaintiff may rescind.<sup>47</sup>

But it is also a part of this rule that a contract may not be rescinded on account of a default or failure of performance in respect to a matter which is merely technical, or which is insignificant or of minor importance as respects the main objects of the contract.<sup>48</sup> For instance, a land

<sup>42</sup> *Pratt v. Paris Gaslight & Coke Co.*, 155 Ill. 531, 40 N. E. 1032; *Loveland v. Steenerson*, 99 Minn. 14, 108 N. W. 831; *Loveland v. Beumer*, 102 Minn. 1, 112 N. W. 864. But where the seller was willing to furnish the bond, the buyer, in an action to rescind the contract for delay in delivery, cannot urge as a ground for rescission that the bond was not in fact given. *American Case & Register Co. v. Griswold*, 68 Misc. Rep. 379, 125 N. Y. Supp. 4. And where a contract of sale of goods provides that the seller shall furnish a bond, the giving of an objectionable bond is not a ground for rescission, where, promptly on notice, a sufficient bond is supplied pursuant to the contract. *Standard Mfg. Co. v. Slaughter*, 122 Ill. App. 479.

<sup>43</sup> *Reynolds v. Lynch*, 98 Minn. 58, 107 N. W. 145.

<sup>44</sup> *Schiff v. Tamor*, 104 App. Div. 42, 93 N. Y. Supp. 853.

<sup>45</sup> *Moreau v. Chauvin*, 8 Rob. (La.) 157.

<sup>46</sup> *Seven Mile Beach Co. v. Dolley*, 71 N. J. Eq. 735, 65 Atl. 991, 66 Atl. 191.

<sup>47</sup> *Jansen v. Schneider*, 78 Misc. Rep. 48, 138 N. Y. Supp. 144.

<sup>48</sup> *Anglo-Wyoming Oil Fields v. Miller*, 117 Ill. App. 552 (affirmed, 216 Ill. 272, 74 N. E. 821); *Barr v. Little*, 54 Neb. 556, 74 N. W. 850; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78



company sold lots on the condition that it would secure the location of a manufacturing plant on certain land, the contract of purchase also providing that the land company should pay the manufacturing company a certain bonus, and should sell a certain number of lots, from the proceeds of which the bonus was to be raised. The location of the plant was secured as agreed, and it was held that the fact that the requisite number of lots was not sold, or the full amount of the bonus paid, was not sufficient ground for the rescission of the contract, as these matters were merely minor details conducing to the location of the plant.<sup>49</sup> So, where the owners of a tract of land, who were also interested in a tannery, entered into a contract with the owners of the tannery for the sale of all the bark growing on the tract of land, the bark to be used in the tannery in carrying on the same, to be paid for before removal from the land and to remain the property of the vendors until paid for, it was held that the provision requiring the use of the bark in the tannery was not such a condition or limitation as would entitle the vendors to insist upon the use of the bark within the tannery alone, and to rescind the contract in the event of its destruction by fire.<sup>50</sup> Again, an owner of land contracted in writing to sell the same to the plaintiff, and thereafter, under certain provisions of the contract, he sent a notice to the plaintiff purporting to cancel the contract for certain alleged defaults. The grounds alleged were that the plaintiff did not personally cultivate the land, and had omitted individually to turn over one-half of the crop to the seller, but there was no evidence that the land was not cultivated, or that half of the crop was not turned over as agreed; and it was held that such grounds of forfeiture were not sufficient.<sup>51</sup> So also, there is no ground for rescission where a partial failure of performance occurs through mere inadvertence,<sup>52</sup> or through a mistake which

N. E. 701; *Hunt v. American Radiator Co.*, 2 App. Div. 34, 37 N. Y. Supp. 576; *Hill v. Still*, 19 Tex. 76; *Hoffman v. King*, 70 Wis. 372, 36 N. W. 25.

<sup>49</sup> *Lewis v. Brookdale Land Co.*, 124 Mo. 672, 28 S. W. 324.

<sup>50</sup> *Lyon v. Hersey*, 103 N. Y. 264, 8 N. E. 518.

<sup>51</sup> *Bucholz v. Leadbetter*, 11 N. D. 473, 92 N. W. 830.

<sup>52</sup> *Kenner v. Allen*, McGloin (La.) 214.

the other party is willing and able to correct at his own expense.<sup>53</sup> This rule was applied in a case where the seller of a chattel asked for a chattel mortgage to secure payment, but agreed instead to take the buyer's note at four months, and by mistake the blank note which was sent to the buyer for his signature contained a chattel-mortgage clause.<sup>54</sup>

Nor can rescission be demanded for a partial failure of performance, where the contract itself provides for the compensation or damages to be allowed in such a case, and fixes the method of ascertaining the amount thereof.<sup>55</sup> But in a case in Alabama, where the defendant agreed to transact certain business for the plaintiff and to be accountable for defaults in performance, it was held that the stipulation to be responsible for defective performance was merely an agreement that damages for such omissions might be set off against the defendant's compensation, and did not contemplate that frequent failures to perform should not constitute a breach of the contract, but should be compensated by deductions from the consideration, and hence that frequently recurring omissions on the part of the defendant would entitle the plaintiff to rescind the contract.<sup>56</sup>

Again, it is a rule that "when a contract has been partially executed, and one of the parties has derived substantial benefits or has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance, but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation in damages for that breach."<sup>57</sup> Thus, where the purchaser of a set of books, after part had been delivered and his pay-

<sup>53</sup> *Miller v. Benjamin*, 142 N. Y. 613, 37 N. E. 631.

<sup>54</sup> *Embree-McLean Carriage Co. v. Lusk*, 11 Tex. Civ. App. 493, 33 S. W. 154.

<sup>55</sup> *Gibbs v. School District of Borough of Girardville*, 195 Pa. 396, 46 Atl. 91.

<sup>56</sup> *Davis v. Wade*, 4 Ala. 208.

<sup>57</sup> *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *In re Morgantown Tin Plate Co.* (D. C.) 184 Fed. 109; *Burge v. Cedar Rapids & M. R. Co.*, 32 Iowa, 101.

ments were in default, refused to make payments because of the non-delivery of the remainder, and offered to waive the payments made and return the books received, it was held that the seller had a right to refuse to accept a return.<sup>58</sup> But where the vendee in a land contract is in default, and has trifled or shown backwardness, and his default is gross, and the circumstances or value of the property have materially changed, a rescission ought to be decreed.<sup>59</sup>

A different rule prevails where the contract embraces the sale and delivery of several distinct articles, or the performance of several distinct acts, and is divisible, with nothing to show that complete performance of the whole is essential to the object or purpose of the contract. Here a party is not ordinarily allowed to rescind for failure of performance as to one of the several things embraced in the contract.<sup>60</sup> Thus, where a stipulation for support and maintenance constituted but a part of the consideration for a deed of land, a partial failure to perform that stipulation should not necessarily operate to rescind the contract, but should rather lead to the enforcement of the executory part, if it can be done so as substantially to obtain the objects of the contract.<sup>61</sup> But if a contract has been partially performed, and the other party accepts such part performance and settles and pays for it, this may be considered as rescinding the contract as to the future or unexecuted part of it.<sup>62</sup> On this principle, where the plaintiff had agreed to purchase a piano, and to pay a part of the price in cash and the balance in advertising, it was held that he could not

<sup>58</sup> *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009.

<sup>59</sup> *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

<sup>60</sup> *Hansen v. Baltimore Packing & Cold-Storage Co.* (C. C.) 86 Fed. 832; *Power v. Brown*, 25 Ohio Cir. Ct. R. 420; *Luce v. New Orange Industrial Ass'n*, 68 N. J. Law, 31, 52 Atl. 306; *Meyer v. Martin* (Tex. Civ. App.) 50 S. W. 470; *Burge v. Cedar Rapids & M. R. Co.*, 32 Iowa, 101. But see *Gayle v. Troutman*, 31 Ky. Law Rep. 718, 103 S. W. 342.

<sup>61</sup> *Keltner v. Keltner*, 6 B. Mon. (Ky.) 40.

<sup>62</sup> *Hopkins v. Sickles*, Wright (Ohio) 376; *Barber v. Lyon*, 8 Blackf. (Ind.) 215. Compare *Peck-Williamson Heating & Ventilating Co. v. Board of Education*, 6 Okl. 279, 50 Pac. 236.

repudiate his obligation to receive the piano, and recover payment in money for advertising already published, on the ground that all the advertising contemplated by the contract was not done, where it appeared that the defendant had waived his right to the balance.<sup>63</sup>

**§ 199. Performance Not in Accordance with Terms.—**Every party to a contract has the right to expect and require that the other party will fulfill his engagement exactly according to its terms. No one can be forced to accept a substitution in respect to the subject-matter of the contract, or the tender of something different from, though perhaps equivalent to, what was contracted for. Hence an attempted performance of a contract, not in accordance with its terms, is no performance at all, but furnishes ground for rescission. Thus, if one contracts to buy a machine, an automobile, a piano, etc., of a particular make or kind, and the seller delivers one of a different make or kind, the buyer may rescind the contract.<sup>64</sup> So, where a contract for the sale of goods made the price payable when the goods arrived at a designated place, a shipment of them to a different place, with instructions that they were to be held there until the buyer paid the price, was a violation of the contract such as to justify the buyer in rescinding.<sup>65</sup> Similarly, a right of rescission exists where a purchaser of land agrees, as a part of the consideration, to extinguish a mortgage on the premises, but instead of doing so, takes an assignment of the mortgage and attempts to foreclose it,<sup>66</sup> or where money is deposited with trustees under a contract stipulating that they shall purchase certain property in their own names, but instead of that, the property is purchased in the name of a third person.<sup>67</sup> But if the person who has a right to object to the faulty or changed performance of the contract does not exercise this right, but accepts such performance as is tendered and expresses himself as

<sup>63</sup> *Mail & Times Pub. Co. v. Marks*, 125 Iowa, 622, 101 N. W. 458.

<sup>64</sup> *Barry v. Danielson*, 78 Wash. 453, 139 Pac. 223.

<sup>65</sup> *Robert M. Green & Sons v. Lineville Drug Co.*, 167 Ala. 372, 52 South. 433.

<sup>66</sup> *Ong v. Campbell*, 6 Watts (Pa.) 392.

<sup>67</sup> *Payne v. Pomeroy*, 21 D. C. 243.

satisfied with it, this will operate as a rescission of the original agreement, so that he cannot afterwards insist upon the terms of it.<sup>68</sup> And of course it is always within the power of the parties, by their mutual consent, to change or modify the terms of their contract, and when this is done, performance in accordance with the modified terms will suffice to bind the other party.<sup>69</sup> But a change in some one or more particulars does not throw open the whole contract. Thus, a change in the place of delivery, after making a contract for the sale of a machine, does not release the buyer from the duty of returning the machine, as agreed in the contract, in case of a failure of the warranty.<sup>70</sup>

**§ 200. Defective or Unsatisfactory Performance of Work.**—A person who employs another to do work for him on the express or implied agreement that the work shall be done in a workmanlike manner, may terminate the contract on discovering that the work is being done unskillfully, negligently, or in a manner injurious to his property.<sup>71</sup> And this rule applies not only to the exercise of such trades or mechanical arts as require training and skill of hand or eye, but to services rendered in those professions where the object is the giving of gratification or entertainment by the display of unusual natural gifts or highly cultivated art, such as the work of actors and musicians.<sup>72</sup> The rule also enables the party to whom the services are to be rendered not only to stop the work during its progress, but to repudiate and reject it after completion, when it has been done in such a defective or negligent manner that it is of no value to him; and when this is done, the other party can base no claims upon a subsequent attempt to perform the work according to the original contract.<sup>73</sup> In a case where county warrants were issued for the cost of building a bridge, the

<sup>68</sup> *Buford v. Funk*, 4 G. Greene (Iowa) 493.

<sup>69</sup> *Robinson v. Batchelder*, 4 N. H. 40; *Babcock v. Purcupille*, 36 Neb. 417, 54 N. W. 675.

<sup>70</sup> *Gammar v. Borgain*, 27 Iowa, 369.

<sup>71</sup> *Ferris v. Hoglan*, 121 Ala. 240, 25 South. 834; *Husted v. Craig*, 36 N. Y. 221; *Feinberg v. Weiher* (Com. Pl.) 19 N. Y. Supp. 215.

<sup>72</sup> *McLaughlin v. Hammerstein*, 99 App. Div. 225, 90 N. Y. Supp. 943. And see, *supra*, § 192.

<sup>73</sup> *Miller v. Phillips*, 31 Pa. 218.

contractors undertaking to build it in a workmanlike manner, but the bridge collapsed within a year after its completion because it was unskillfully constructed, it was held that the county could maintain a suit in equity to cancel the warrants and recover the money paid on the contract.<sup>74</sup> So, where a heavy manufacturing building was so constructed by defendants, the contractors, that within two months it required repairs to make it safe, costing approximately \$15,000, it was held to be no defense to an action for breach of the contract that the work and materials were approved by the architect as it progressed.<sup>75</sup>

But one who wishes to terminate a contract for this reason must fulfill whatever duties towards the other party may be imposed upon him by the contract itself. Thus, if it requires him to give written notice of his intention to stop the work, he cannot put an end to the contract without such notice.<sup>76</sup> And his dissatisfaction with the work must be real, not arbitrary, and founded on substantial defects or faults.<sup>77</sup> The courts will discountenance a fraudulent attempt to get rid of the obligations of a contract by a pretended dissatisfaction with the work which is being done under it.<sup>78</sup>

This rule has been extended to cases where, after the contract is made, but before any steps are taken in the execution of it, it is discovered that the contracting party is incompetent to perform the required work in a proper or satisfactory manner. Thus, it is said that, if one who has hired a servant or other employé discovers, before the term of employment begins, that he is a drunkard, the contract may be rescinded.<sup>79</sup>

<sup>74</sup> *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 South. 196.

<sup>75</sup> *Mohawk Overall Co. v. Brown*, 163 App. Div. 157, 148 N. Y. Supp. 369. But compare *Town of Packwaukee v. American Bridge Co.*, 183 Fed. 359, 105 C. C. A. 579.

<sup>76</sup> *Rodemer v. Gonder*, 9 Gill (Md.) 288.

<sup>77</sup> *Gould v. McCormick*, 75 Wash. 61, 134 Pac. 676, 47 L. R. A. (N. S.) 765, Ann. Cas. 1915A, 710.

<sup>78</sup> *Brucker v. Manistee & G. R. R. Co.*, 166 Mich. 330, 130 N. W. 822.

<sup>79</sup> *Johnson v. Gorman*, 30 Ga. 612; *Nolan v. Thompson*, 11 Daly (N. Y.) 314.

§ 201. **Excuses for Default.**—Failure of performance is not ground for the rescission of a contract when the party in default can show a justification or a sufficient excuse for his delinquency. The fact that performance of the contract has become impossible by reason of supervening facts for which he is not responsible is such an excuse.<sup>80</sup> But mere financial stringency or the difficulty of raising money is not a legally sufficient excuse for failure to make a payment on a contract for the purchase of land.<sup>81</sup> And one who has contracted to convey land, having first to get in an outstanding title, is not excused from punctual performance of his undertaking by the fact that pressure of business upon the holder of the outstanding title caused a delay in the conveyance of it to him.<sup>82</sup> So, where one has contracted to deliver, in weekly installments, a large number of manufactured articles, he cannot claim an extension of time for delivery as a matter of right because he is unable to secure a sufficient number of workmen to complete his contract, but the other party may cancel the order for the actual or expected delay.<sup>83</sup> In some exceptional cases, however, an excuse for delay may be found in accidental causes for which the party was not responsible and over which he had no control. In a case in the federal courts, it appeared that plaintiff sold to defendant the old rails to be taken up from its railroad, to be shipped as soon as the new rails were laid, “delivered f. o. b. Pennsylvania Railroad cars” at a named place. Two shipping orders were given by defendant covering part of the rails. The first was promptly filled, and, on receipt of the second, cars were at once ordered and were filled as fast as received, but there was a delay on the part of the railroad company in furnishing the cars, of which fact defendant was advised. It was shown that plaintiff did all that was in its power to obtain the cars promptly. It was held that, under the contract, plaintiff was not bound to furnish the cars, nor was it responsible for the delay, and hence it was not chargeable with such a breach of the con-

<sup>80</sup> See, *infra*, §§ 208, 209.

<sup>81</sup> *Yoss v. De Freudenrich*, 6 Minn. 95 (Gil. 45).

<sup>82</sup> *Haynes v. Fuller*, 40 Me. 162.

<sup>83</sup> *White v. Wolf*, 185 Pa. 369, 39 Atl. 1011.



tract as would warrant the defendant in canceling the same or in refusing to order or accept further shipments.<sup>84</sup>

Again, a party cannot rescind a contract because of a breach or failure of performance which was occasioned by his own act or fault.<sup>85</sup> Thus, the owner of an undivided one-fourth interest in mortgaged land agreed to convey his interest on a day stated if the vendee would pay one-fourth of the mortgage. This the vendee agreed to do and was ready and able to do, but found it impossible, because the owner had secured an extension of the mortgage as to the other three-fourths and the mortgagee would not accept payment of one-fourth of the mortgage. It was held that the vendor could not declare a forfeiture.<sup>86</sup> So, where a title bond binds the obligor to convey a certain quantity of land in one, two, or three surveys, as the obligee may choose, the former is not bound to convey until the latter has made his selection; and if circumstances make an actual survey necessary, a rescission of the contract cannot be decreed until a survey has been made.<sup>87</sup> In another case, vendors sued to annul a contract for the conveyance of land on the ground that the vendees had failed and refused to make the required payment. But rescission was denied because it was shown that the vendees had endeavored to comply with the notice served on them, and attempted to make payment of the balance due at the place specified and to the officers of a bank, who were plaintiffs' agents to receive the payments, which they declined to accept, and referred the vendees to one of the plaintiffs, to whom they paid the balance.<sup>88</sup> And generally, where the delay of a purchaser of land to make payment is occasioned by facts which throw a cloud on the title and render it suspicious to the minds of reasonable men, and to any considerable extent affect the value of the property, such delay does not en-

<sup>84</sup> *Baltimore & L. Ry. Co. v. Steel Rail Supply Co.*, 123 Fed. 655, 59 C. C. A. 419.

<sup>85</sup> *Burris v. Shrewsbury Park Land & Improvement Co.*, 55 Mo. App. 381. And see, *infra*, § 205. Compare *Carter v. Hoke*, 64 N. C. 348.

<sup>86</sup> *Guthrie v. Baton*, 223 Pa. 401, 72 Atl. 788.

<sup>87</sup> *Purcell v. McCleary*, 10 Grat. (Va.) 246.

<sup>88</sup> *Nelson v. Geaskamyler*, 84 Minn. 432, 87 N. W. 1121.

title the vendor to rescind the sale because of the failure to make payment.<sup>89</sup>

It is not unusual to insert in contracts a clause intended to prevent a forfeiture or a claim of damages for non-performance or for delay in performance, when the default is attributable to strikes or other labor troubles, to unavoidable stoppage of operations from other causes, or to unavoidable accidents. Such a provision is perfectly legal, and it will protect the contractor so far as it goes. But the effect is to render inexcusable a default or delay which is not attributable to one or other of the specially excepted causes, and to give the other party a right to rescind for delay or failure of performance not so caused.<sup>90</sup> But in a case in Texas, where defendant contracted to convey certain land to plaintiff on or before a specified date, "except unavoidably restrained," and at the time of such contract defendant had not title to all of the land, but had applied for a patent and had done all in his power to procure it, it was held that his failure to perform his agreement within the specified time was not ground for rescinding the contract.<sup>91</sup>

Finally, delay or default in performance of a contract may be neutralized by the acquiescence in it of the other party, or his waiver or failure to object, or by his consent to a corresponding modification of the contract.<sup>92</sup> And where past delays or failures of performance in a continuing contract have been acquiesced in and settled for, the contract cannot be terminated merely from an assumption, from past experience, that similar delays or failures will occur in the future, without first taking steps to put the other party in default.<sup>93</sup>

**§ 202. Refusal of Performance.**—When one of the parties to a contract unjustifiably refuses to perform his

<sup>89</sup> *Mastin v. Grimes*, 88 Mo. 478.

<sup>90</sup> *United States Iron Co. v. Sloss-Sheffield Steel & Iron Co.*, 71 N. J. Law, 1, 58 Atl. 173.

<sup>91</sup> *Burwell v. Sollock* (Tex. Civ. App.) 32 S. W. 844.

<sup>92</sup> *Papin v. Goodrich*, 103 Ill. 86; *Brock v. Hidy*, 13 Ohio St. 306; *Stone v. West Jersey Ice Mfg. Co.*, 65 N. J. Law, 20, 46 Atl. 696; *Davies v. Hotchkiss* (Sup.) 112 N. Y. Supp. 233.

<sup>93</sup> *Barnette Sawmill Co. v. Ft. Harrison Lumber Co.*, 126 La. 75, 52 South. 222.

agreement as a whole, or any substantial part of it, this gives to the other party the option to rescind the entire contract, provided he offers to do so within a reasonable time, and will restore what he has received, and provided that the situation of the parties remains so far unchanged that they can be restored to their first position.<sup>94</sup> Thus, in contracts for the sale of goods, if one who has sold a commodity to another repudiates his obligation to deliver, the other party may act upon such refusal and rescind the contract.<sup>95</sup> And so, in case of a refusal without cause to furnish any installment of goods, under a contract providing for their delivery and payment in installments,<sup>96</sup> or a refusal to deliver the goods until the seller has obtained a secured note for part of the price,<sup>97</sup> or a refusal to pay the storage charges of a bailee having possession of the goods at the time of the sale, where it was a part of the seller's agreement that he would pay such charges and deliver the property on demand of the purchaser.<sup>98</sup> And on the other hand, a vendor who contracts to sell and deliver personal property at a time in the future at a certain price, and who, when the time for delivery arrives, is ready and willing to make delivery, but is prevented from doing so by the unjustifiable refusal of the purchaser to accept, may elect to consider the contract at an end.<sup>99</sup> The same rule applies where the buyer, without sufficient cause, rejects a part of the goods

<sup>94</sup> *Munroe v. Trenton Oil Cloth & Linoleum Co.*, 206 Fed. 456, 124 C. C. A. 362; *Dubois v. Xiques*, 14 La. Ann. 427; *Chase v. Turner*, 10 La. 19; *Dean v. Hitchings*, 40 Minn. 31, 41 N. W. 240; *Lockwood v. Geler*, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245; *Benson v. Larson*, 95 Minn. 438, 104 N. W. 307; *Somers v. Sturre*, 106 Minn. 221, 118 N. W. 682; *Webb v. Stone*, 24 N. H. 282; *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 359; *Graves v. White*, 87 N. Y. 463; *Hebrew Pub. Co. v. Reibstein*, 126 App. Div. 274, 110 N. Y. Supp. 660; *Halloway v. Davis, Wright (Ohio)* 460; *El Paso & S. W. R. Co. v. Eichel (Tex. Civ. App.)* 130 S. W. 922. See *Houston v. Greiner*, 73 Or. 304, 144 Pac. 133; *Morris v. Brown (Tex. Civ. App.)* 173 S. W. 265.

<sup>95</sup> *Staley v. Lyman*, 151 Ill. App. 137; *H. D. Williams Cooperage Co. v. Scofield*, 115 Fed. 119, 53 C. C. A. 23.

<sup>96</sup> *California Sugar & White Pine Agency v. Penoyar*, 167 Cal. 274, 139 Pac. 671.

<sup>97</sup> *Bumpass v. Harrolson, Minor (Ala.)* 162.

<sup>98</sup> *Malone v. Minnesota Stone Co.*, 36 Minn. 325, 31 N. W. 170.

<sup>99</sup> *Middle Division Elevator Co. v. Vandeventer*, 80 Ill. App. 669; *Tyson v. Doe*, 15 Vt. 571. See *Hill v. McKay*, 94 Cal. 5, 29 Pac. 406.

delivered under the contract. The seller may thereupon declare the contract at an end and refuse to proceed further under it.<sup>100</sup> And so, the seller may treat the contract as canceled where it provides that the goods shall be taken up at least every thirty days, but the buyer refuses to furnish shipping directions after numerous requests.<sup>101</sup> And so, where a mutual contract was entered into to take the entire output of a coal mine for a specified season, the quantity being fixed within designated limits, and afterwards the purchaser refuses to take the coal according to the contract, such refusal renders it unnecessary for the owner of the mine to take the coal out of the ground, and gives him an immediate right of action.<sup>102</sup>

The same principles apply to contracts for the sale of real property. Where a vendor is ready, able, and willing to fulfill the contract on his part, and tenders performance, but the vendee refuses to buy, the vendor may rescind the contract, and may, if he chooses, then sell the land to another person without incurring any responsibility.<sup>103</sup> This rule was applied in a case where the vendees refused to take the property because one of the proposed grantees in the deed was dead, and because they said that the deed was "not right," but without pointing out any defects,<sup>104</sup> and in a case where the vendee refused, without assigning any sufficient reason, to comply with that part of his contract which required him to give a mortgage on the property for part of the price,<sup>105</sup> and in a case where a person purchased the equitable title to land, but refused to pay therefor until the vendor should have recovered the legal title.<sup>106</sup> Conversely, the consideration for a contract for the sale of land, in the vendee's favor, is the title to be conveyed upon performance, and if the vendor refuses to convey after full performance

<sup>100</sup> *J. Aaron & Co. v. M. G. Smith Co.*, 45 Tex. Civ. App. 203, 100 S. W. 347.

<sup>101</sup> *Long Bell Naval Stores Co. v. Central Commercial Co.*, 178 Ill. App. 7.

<sup>102</sup> *Morier v. Moran*, 58 Ill. App. 235.

<sup>103</sup> *Lane v. Lesser*, 135 Ill. 567, 26 N. E. 522.

<sup>104</sup> *Hunter v. Lewis*, 234 Pa. 134, 82 Atl. 1100.

<sup>105</sup> *Davison v. Associates of Jersey Co.*, 6 Hun (N. Y.) 470.

<sup>106</sup> *McKinley v. Butler*, 4 Litt. (Ky.) 196.

or offer to perform, the consideration for the contract wholly fails and there is ground for rescission by the vendee.<sup>107</sup> So, under a contract to sell lots with a right of way until a road should be opened in front of the lots, the closing of the right of way and refusal to open the road entitle the purchaser to rescind.<sup>108</sup> And a party to a contract who agrees to sell land, and to erect thereon a building in accordance with certain plans and specifications, but who refuses to follow the specifications when requested by the purchaser, thereby authorizes the purchaser to consider the contract as rescinded.<sup>109</sup> Again, a deed conveying land in consideration of marriage will be canceled and a reconveyance directed when the grantee has refused to carry out the agreement.<sup>110</sup>

Other forms of contract besides sales are included within the operation of these rules. Thus one may rescind a special contract to perform certain work in a given time for another, upon the latter's refusal to make a stipulated payment, and he may recover pro rata at the contract price for what he has done.<sup>111</sup> And conversely, if one has undertaken to perform an act and has been paid the consideration, and then refuses or fails, the promisee may treat the refusal, or such a degree of neglect as is equivalent to a refusal, as a rescission of the contract and may recover back the price paid.<sup>112</sup> In an early case in New York, there was an agreement between A. and the water commissioners of the city of New York, by which A. agreed to perform certain work upon the Croton aqueduct, and it was provided that A. should make any alterations in the form, dimensions, or materials of the work which might be directed in writing by the water commissioners or by their chief engineer. It was held that the water commissioners had no authority to

<sup>107</sup> *Miller v. Shelburn*, 15 N. D. 182, 107 N. W. 51; *Montgomery v. Wise*, 138 Mo. App. 176, 120 S. W. 100.

<sup>108</sup> *Miller v. Beck*, 72 Or. 140, 142 Pac. 603.

<sup>109</sup> *Buena Vista Co. v. McCandlish*, 92 Va. 297, 23 S. E. 781.

<sup>110</sup> *Lambert v. Lambert*, 66 W. Va. 520, 66 S. E. 689, 19 Ann. Cas. 537.

<sup>111</sup> *Preble v. Bottom*, 27 Vt. 249.

<sup>112</sup> *Mound City Distilling Co. v. Consolidated Adjustment Co.*, 152 Ill. App. 155.

stop the work, under color of changing the form or dimensions of the work, without any directions in writing for such change having been given to A., either by the commissioners or by the chief engineer, and that such stopping of the work was to be deemed a rescission of the contract by the commissioners, so that A. could recover upon a quantum meruit for the work actually done by him.<sup>113</sup> So also, in relation to building contracts, when there is a refusal to give a bond for payment of the price, as agreed, a building contractor has a right either to rescind the contract, leaving him without remedy upon it, or to treat the contract as terminated and sue for the breach.<sup>114</sup> And a building contractor is justified in abandoning his work when the owner refuses to pay as the work progresses, as provided by the contract, or where such owner orders him to quit and says that he will have the work done by another.<sup>115</sup>

To warrant a rescission on this ground, the refusal to perform must be distinct, unequivocal, and absolute, and must be acted upon as such by the party to whom the broken promise was made.<sup>116</sup> A mere suggestion that performance of the contract should be delayed to a future time is not a repudiation of its obligations nor ground for rescission,<sup>117</sup> nor is a mere request that a commodity which is the subject of a sale should conform to certain standards not incorporated in the contract.<sup>118</sup> And the refusal of the vendee in an executory contract for the sale of real estate to perform the contract according to its terms, with an offer to perform in accordance with the vendee's own erroneous interpretation thereof, does not entitle the vendor to rescind.<sup>119</sup> But writing to the vendor not to send or deliver the article contracted to be purchased is a distinct refusal

<sup>113</sup> *Clark v. City of New York*, 3 Barb. (N. Y.) 288, affirmed in 4 N. Y. 338, 53 Am. Dec. 379. -

<sup>114</sup> *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

<sup>115</sup> *Worden v. Connell*, 196 Pa. 281, 46 Atl. 298.

<sup>116</sup> *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895.

<sup>117</sup> *Brockenbrough v. Champion Fibre Co.*, 176 Fed. 840, 100 C. C. A. 310.

<sup>118</sup> *Howe Grain & Mercantile Co. v. Taylor* (Tex. Civ. App.) 147 S. W. 656.

<sup>119</sup> *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895.

to perform the contract,<sup>120</sup> and so is the action of a purchaser who brings a suit at law for the breach of the contract or an action to recover back the money paid by him,<sup>121</sup> or who insists on the return of a deposit given to secure the performance of the contract on his part.<sup>122</sup> And so, under a contract with a ditch company to furnish a consumer with a certain amount of water year after year, so long as he should pay the annual rental therefor, it was held that his act in causing the county commissioners to fix a rate for water from the company's ditch, and in declining to pay more than such rate, was a termination of the contract, although the contract itself was not returned or canceled.<sup>123</sup> But where property is sold payable in installments, a refusal by the vendor to give a receipt for a payment made will not justify a rescission by the vendee, even if a receipt is required by the contract.<sup>124</sup>

When one of the parties thus refuses to comply with his part of the contract, and the other declines to proceed with it on the ground of such refusal, the contract is definitely terminated, and any subsequent acts or conduct by the party first refusing, in the line of performance of the contract, will not reinstate it or renew its obligation, unless concurred in by the other,<sup>125</sup> although of course, the contract may be resumed and continued, even after such a rescission, by the mutual consent of the parties.<sup>126</sup> And it has been held that, where a contractor has unadvisedly refused to perform his contract, he may, while the situation of the matter is unchanged, retract the refusal and go on with the contract, though the other party thereto has notified him that he will hold such refusal to be a default, and will sue to dissolve the contract.<sup>127</sup>

<sup>120</sup> *Textor v. Hutchings*, 62 Md. 150.

<sup>121</sup> *Herrington v. Hubbard*, 1 Scam. (2 Ill.) 569, 33 Am. Dec. 426.

<sup>122</sup> *El Paso Cattle Co. v. Stafford*, 176 Fed. 41, 99 C. C. A. 515.

<sup>123</sup> *South Boulder & R. C. Ditch Co. v. Marfell*, 15 Colo. 302, 25 Pac. 504.

<sup>124</sup> *Weintz v. Hafner*, 78 Ill. 27.

<sup>125</sup> *Byrd v. Craig*, 1 Mart. (La.) N. S. 625; *Moreau v. Chauvin*, 8 Rob. (La.) 157.

<sup>126</sup> *Grove v. Donaldson*, 15 Pa. 128.

<sup>127</sup> *Perkins v. Frazer*, 107 La. 390, 31 South. 773.



§ 203. **Anticipatory Breach of Contract.**—An anticipatory breach of a contract occurs when one of the parties, before the time arrives for performance on his part, declares his positive intention not to perform the contract according to its terms. This will not of itself terminate the contract, but it will give to the other party the right, at his election, to treat the contract as rescinded and to seek his appropriate remedies.<sup>128</sup> “Where one party to a contract to be performed in the future, before the time for performance arrives, refuses to perform, or declares his intention not to perform, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such renunciation, however, in and of itself, does not work a rescission, for one party to a contract cannot by himself rescind it. But by making the wrongful renunciation he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect to such wrongful rescission. A declaration by the promisor, before the time for performance has arrived, of his intention not to perform is not in itself, and unless acted on by the promisee, a breach of the contract. Such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such.”<sup>129</sup> So, in an English case, it was said: “The other party may adopt such renunciation of the contract by so acting upon it as, in effect, to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat

<sup>128</sup> *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Supreme Council v. Lippincott*, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803; *Supreme Council v. Daix*, 130 Fed. 101, 64 C. C. A. 435; *Blakely v. Fidelity Mut. Life Ins. Co. (C. C.)* 143 Fed. 619; *Northwestern Nat. Life Ins. Co. v. Hare*, 26 Ohio Cir. Ct. R. 197; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460; *Hochster v. De La Tour*, 2 El. & Bl. 678.

<sup>129</sup> *Supreme Council v. Lippincott*, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803.

such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when, in the ordinary course, a cause of action on the contract would arise. He must elect which course he will pursue."<sup>180</sup>

A life insurance company, doing business on the assessment plan, commits an anticipatory breach of its contract with a policy holder by making a higher assessment against his policy than is authorized by the contract and announcing its intention to continue to do so, and in such case the insured has his election to accept such action as a rescission of the contract and sue for the breach, or to refuse to rescind and continue to treat the contract as in force, by tendering payment of the amount lawfully due.<sup>181</sup> In another case, an insurance society, having issued to the plaintiff a certificate for \$5,000, passed a by-law reducing certificates of \$5,000 to \$2,000, and thereafter refused to consider plaintiff's certificate as in force for more than the last-named sum. The plaintiff protested against such attempted reduction, offered to pay assessments on the full face value of his certificate, and thereafter paid assessments based on the reduced amount under protest for a period of over two years, when he notified defendant of his intention to cancel the insurance and demanded repayment of the assessments paid. It was held that the plaintiff would have been entitled to this relief on the defendant's breach of its contract in the first instance, but as he had elected to treat the contract as continuing, notwithstanding defendant's breach, by paying assessments during that time, he was not entitled to make a second election to rescind.<sup>182</sup> But in a case in Connecticut, it appeared that a contract required one of the parties to furnish to the other a specified amount of pulp before a certain date, shipments to be made as ordered. For a considerable time during the term of the contract, no

<sup>180</sup> *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460.

<sup>181</sup> *Blakely v. Fidelity Mut. Life Ins. Co. (C. C.)* 143 Fed. 619.

<sup>182</sup> *Supreme Council v. Lippincott*, 134 Fed. 824, 67 C. C. A. 650, 69 L. R. A. 803.

shipments were ordered by the purchaser, and at length the purchaser telegraphed a direction that no shipments should be made. But his letters were to the effect that all pulp purchased would be taken from the other party, that he hoped to have use for a large quantity of pulp, etc. It was held that there had been no anticipatory breach by the purchaser which would warrant the seller in rescinding the contract and suing for damages.<sup>183</sup>

§ 204. **Declared Intention Not to Perform.**—A party to an executory contract may always stop performance by the other party by giving an explicit direction to that effect, but in so doing, he renders himself liable for such damages as the other may sustain in consequence.<sup>184</sup> Hence a declared intention to repudiate a contract, or to refuse to perform it, excuses the other party from the necessity of tendering performance, though this is not technically a rescission nor the acceptance of a rescission, since it leaves the contract in existence so far as to sustain an action for damages for its breach. “Where one party to a contract renounces it and refuses to perform, the other party may treat the contract as broken and abandon it without demand or tender of performance, and recover as damages the profits he would have received through full performance. Such an abandonment is not a rescission of the contract, but a mere acceptance of the situation which the wrongdoing of the other party has brought about.”<sup>185</sup> According to a slightly different view, the party who declares his intention not to perform may be considered as having rescinded the contract, but it is a wrongful rescission, for which an action will lie. The other party may “agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission.” He “may adopt such renunciation of the contract by so acting upon it as in effect to declare that he, too, treats the con-

<sup>183</sup> *Wells v. Hartford Manilla Co.*, 76 Conn. 27, 55 Atl. 599.

<sup>184</sup> *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423; *Bixler v. Finkle*, 85 N. J. Law, 77, 88 Atl. 846.

<sup>185</sup> *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *Hayes v. City of Nashville*, 80 Fed. 641, 26 C. C. A. 59; *Bixler v. Finkle*, 85 N. J. Law, 77, 88 Atl. 846.

tract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.”<sup>136</sup>

An intention to refuse performance of a contract may be manifested by an explicit declaration to that effect, as where a buyer of personal property refuses for two years to pay a deferred installment of the price, and, in his pleading in an action by the seller to recover possession, repudiates any further obligation.<sup>137</sup> But a refusal in so many words is not necessary. For if the party, while the contract remains executory, does an act, or pursues a course of conduct, which shows indubitably that he does not intend to perform his part of the contract, this justifies the other party in treating it as ended.<sup>138</sup> And where one party to a contract violates some of its substantial provisions, so as to deprive the other party of the benefits of the contract, and manifests an intention to continue such breaches, the other party may abandon further performance of the contract and sue for future profits, although such breaches do not amount to a physical obstruction or prevention of performance by such other party.<sup>139</sup> But a mere unexecuted intention on the part of one of the parties to decline further performance of the contract does not amount to an actual abandonment of it, nor justify the other party in treating it as abandoned,<sup>140</sup> nor would he be warranted in acting on a mere suspicion that the other party does not intend to perform.<sup>141</sup> And even an express statement that one does not mean to abide by his contract will not give the other party a right to consider it as terminated, unless made directly to him or to some person having charge of his interests or the right to

<sup>136</sup> *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *Johnstone v. Milling*, L. R. 16 Q. B. Div. 467; *Wester v. Casein Co. of America*, 206 N. Y. 506, 100 N. E. 488, Ann. Cas. 1914B, 377.

<sup>137</sup> *Rayfield v. Van Meter*, 120 Cal. 416, 52 Pac. 666.

<sup>138</sup> *Drake v. Goree*, 22 Ala. 409; *American Type Founders' Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Peters Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90. See *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Murphy v. Murphy*, 189 Ill. 360, 59 N. E. 796.

<sup>139</sup> *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33.

<sup>140</sup> *Donaldson's Adm'r v. Waters' Adm'r*, 30 Ala. 175.

<sup>141</sup> *Plummer v. Kelly*, 7 N. D. 88, 73 N. W. 70.

act for him.<sup>142</sup> And further, although one of the parties announces that for the future he will not pay at the price fixed by the contract, but at a lower rate, yet if he continues to accept deliveries, he will be considered as having receded from the declared intention, and will be liable for the full contract price.<sup>143</sup>

**§ 205. Performance Prevented by Wrongful Act of Other Party.**—When one of the parties to a contract is ready and able to perform his part of the agreement, but is prevented from doing so by an act of the other party which is wrongful in the sense of being a violation of the contract or inconsistent with its due execution, this gives to the party so prevented from performing a right to consider the contract as abandoned or rescinded, and to resort to an action for his damages.<sup>144</sup> This rule has many important applications, some of which we now proceed to illustrate. Where the contract is for the erection of a building, and the contractor is discharged without good and sufficient cause before completion, or the further progress of the work is wrongfully stopped by the owner, the contractor is entitled to regard the contract as rescinded, and he may recover the value of the work done and materials furnished, giving credit for such sums as he may have received.<sup>145</sup> So also, in contracts of this kind, any unjustifiable interference with the contractor's work, rendering its proper completion impossible or causing him serious loss or injury, will war-

<sup>142</sup> *Taylor v. Provident Sav. Life Assur. Soc.* (C. C.) 134 Fed. 932, affirmed, 142 Fed. 709, 74 C. C. A. 41.

<sup>143</sup> *Cooper Cotton Oil Co. v. Cooper Oil Co.* (Tex. Civ. App.) 160 S. W. 401.

<sup>144</sup> *Connelly v. Devoe*, 37 Conn. 570; *Stoneking v. Long*, 142 Ill. App. 203; *Lake Shore & M. S. Ry. Co. v. Richards*, 40 Ill. App. 560 (affirmed, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33); *Schillinger Bros. & Co. v. Bosch-Ryan Grain Co.*, 145 Iowa, 750, 122 N. W. 961; *Wright v. Haskell*, 45 Me. 489; *McDonough v. Almy*, 218 Mass. 409, 105 N. E. 1012, Ann. Cas. 1915D, 855; *Koerper v. Royal Inv. Co.*, 102 Mo. App. 543, 77 S. W. 307; *Tibbetts v. Sartwell*, 67 N. H. 418, 29 Atl. 411; *Frost v. Clarkson*, 7 Cow. (N. Y.) 24; *Wilt v. Ogden*, 13 Johns. (N. Y.) 56; *Dubois v. Delaware & H. Canal Co.*, 4 Wend. (N. Y.) 285; *Powers v. Hogan*, 6 N. Y. St. Rep. 239; *Suber v. Pullin*, 1 S. C. 273.

<sup>145</sup> *Lossing v. Cushman*, 123 App. Div. 693, 108 N. Y. Supp. 368; *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 815.

rant a rescission. Thus, in one of the cases, the plaintiff entered into a contract with the owner of a building to take it down, and while he was at work within the building, the owner stripped it of sheathing, rafters, purlines, and braces, so that the trusses and spars fell, killing two of plaintiff's employés, and it was held that plaintiff was justified in abandoning the contract.<sup>146</sup> Again, where it is a part of the contract that one party shall from time to time make advances in money to the other, which are necessary to enable such other to carry out his part of the agreement, a refusal to make such advances, not warranted by the circumstances, prevents performance by the other party in such sense as gives him the right to rescind.<sup>147</sup> On the same principle, where the continued use of a building for the purpose for which it was rented is made impossible by the fault of the landlord, the tenant is justified in terminating the lease and vacating the premises.<sup>148</sup> So, one buying from the owner of a vessel a one-eighth interest in it, with the privilege of making the deferred payment out of his wages as master of the vessel, may rescind the contract and recover back the money paid when the owner wrongfully discharges him and takes possession of the ship.<sup>149</sup> Again, one who is employed by the promoters of a corporation to sell on commission the bonds of the company, secured by real estate which the promoters represent to be owned by them and which they are to transfer to the corporation, may rescind his contract on failure of the corporation to obtain title to the property.<sup>150</sup> In a case in Maryland, it appeared that defendant contracted to allow plaintiffs to remove tar from its lands, the agreement being that if the plaintiffs should suspend work for ten days, defendant might terminate the contract and hold any buildings or im-

<sup>146</sup> *Lynch v. Sellers*, 41 La. Ann. 375, 6 South. 561, 5 L. R. A. 682.

<sup>147</sup> *Tinsley v. Foster* (Tex. Civ. App.) 25 S. W. 298; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 105 App. Div. 341, 85 N. Y. Supp. 1034, 93 N. Y. Supp. 1146. But see this last case on appeal, 186 N. Y. 89, 78 N. E. 701.

<sup>148</sup> *Adams v. Werner*, 120 Mich. 432, 79 N. W. 636.

<sup>149</sup> *Moore v. Curry*. 112 Mass. 13.

<sup>150</sup> *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. Rep. 1059.

provements made by plaintiffs. Plaintiffs suspended work for nine days, but on the tenth day they were ready to resume operations, and would have done so had it not been for the fact that defendant had given its employés a holiday, so that there was no one to do the weighing. It was held that defendant was not justified in terminating the contract.<sup>151</sup> So, a case for equitable relief is stated by a bill which alleges that the parties entered into a contract, the performance of which was to extend over a term of years, and that defendant, which is a corporation, has conspired with others to take such action as will render it impossible to perform the contract on its part, and will also render it insolvent, for the purpose of defeating the rights of the complainant.<sup>152</sup> And again, where a plaintiff has performed work pursuant to a contract with the defendant, and has been prevented from completing it by the defendant's failure to perform a portion stipulated to be done by him before the plaintiff's further performance was practicable, the latter may treat the contract as rescinded, and recover the value of the work done.<sup>153</sup>

It is to be observed, however, that no cause for rescission arises, merely because a party is prevented from completing his contract in the time, place, or manner in which he had begun its performance, where this is brought about by changes in the arrangements which the other party is authorized to order under the terms of the contract itself.<sup>154</sup> And a mere improbability that the contractor will be able to perform, arising from changes of plan, is not enough to justify abandonment.<sup>155</sup> In effect, to warrant such a course, the acts of the other party must be such as will render performance of the remainder of the contract impossible, or a thing different in substance from that which was contracted for,<sup>156</sup> or at least there must be such an interference with

<sup>151</sup> *Brown v. Rasin Monumental Co.*, 98 Md. 1, 55 Atl. 391.

<sup>152</sup> *Berliner Gramophone Co. v. Seaman*, 113 Fed. 750, 51 C. C. A. 440.

<sup>153</sup> *Belshaw v. Colle*, 1 E. D. Smith (N. Y.) 213.

<sup>154</sup> *Lewman v. United States*, 41 Ct. Cl. 470; *Howe Sewing Machine Co. v. Layman*, 88 Ill. 39.

<sup>155</sup> *Lewman v. United States*, 41 Ct. Cl. 470.

<sup>156</sup> *Lewman v. United States*, 41 Ct. Cl. 470.



the contractor, and such a hindrance of him in the performance of the contract as will render his performance of it difficult and greatly decrease his profits.<sup>157</sup> In a case in Oregon, the plaintiff contracted to sell to defendant a certain quantity of hops from his farm during each of the following five years, at a certain price, the contract not to be transferable except by the written consent of both parties, and the defendant agreed to pay the purchase price in several installments in each year, and cultivation advances were to bear interest. After the first year, the plaintiff sold the farm to one L., and assigned to him payments to become due under the contract. L. notified the defendant of the assignment, but failed to give the particulars of the transaction, the facts as to the ownership of the farm, the provisions made for money to cultivate the hopyard, etc., although repeatedly asked for such information. For this reason, defendant notified L. and the plaintiff that he rescinded the contract because of plaintiff's violation of it in selling the land and assigning the contract contrary to its provisions. But it was held that L.'s refusal to disclose to defendant the details of the transaction relating to the sale of the land and assignment of the payments did not estop him from enforcing the contract or from questioning defendant's right to rescind it, since the transaction did not render a performance impossible.<sup>158</sup> On the same principle, where a plaintiff contracted to excavate a canal for defendant, and agreed to begin work whenever notified to do so, and he was notified to commence and was put in possession, and there was no interference with him, it was held that he could not defend against a forfeiture claimed because of his failure to begin, on the ground that defendant had not acquired title to the lands when the notice was given, as it could make no difference to plaintiff what was the state of the title.<sup>159</sup> On the other hand, a breach of contract on the part of a plank-road company, in obstructing or hindering

<sup>157</sup> *Anvil Min. Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 88 L. Ed. 814.

<sup>158</sup> *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084.

<sup>159</sup> *Harley v. Sanitary Dist. of Chicago*, 226 Ill. 213, 80 N. E. 771. And see *Butt v. Tuthill*, 10 Iowa, 585.

the stages of a mail contractor while running on the road, gives the party thereby injured a right either to abandon the contract, or to treat it as still subsisting and claim damages for the breach.<sup>160</sup>

When an order for work is wrongfully countermanded without cause, the party injured generally has his election whether to complete the work and claim the contract price or to abandon the work and recover damages for the breach of the contract. But it has sometimes been said that he is equitably bound to choose that course which will be least burdensome to the other party. In an early case in New York, it appeared that the defendant agreed to pay the plaintiff a certain sum of money for cleaning and repairing a number of paintings, and after the work was begun, the defendant desired the plaintiff not to go on with it, as he had concluded not to have the work done. But the plaintiff continued and finished the work, and then claimed to recover the agreed price, contending that the defendant had no right to countermand the order originally given. But the court said: "The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract and thereby incurred a liability to pay such damages as the plaintiff should sustain. But the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been. To persist in accumulating a larger demand is not consistent with good faith towards the employer."<sup>161</sup>

§ 206. **Inability to Perform.**—It will be shown in the following sections that when the performance of a contract according to its terms has become impossible, this will justify a rescission, as, for instance in case of the destruction or perishing of the subject-matter, and so also in cases where one of the parties has disabled himself from fulfilling his part of the agreement, as, for example, by disposing of the subject of a sale to a third person.<sup>162</sup> At present, we are concerned with the general rule that, as soon as it has

<sup>160</sup> *Powell v. Sammons*, 31 Ala. 552.

<sup>161</sup> *Clark v. Marsiglia*, 1 Denio (N. Y.) 317, 43 Am. Dec. 670.

<sup>162</sup> *Infra*, §§ 208-211.

been definitely ascertained that one of the parties to a contract is unable or incompetent to carry out his part of the agreement, the other party will be justified in rescinding the agreement.<sup>163</sup> In one of the illustrative cases it appeared that the plaintiff, who was a sales agent or commission broker, contracted to procure the consignment to defendant of the product of certain silk mills, and defendant agreed to pay commissions on the sale of the product consigned. But after a time the company which owned the mills refused to consign any of its product to the defendant so long as the plaintiff should be retained as sales agent. And thereupon it was held that, as the plaintiff was unable to continue procuring the consignment of the goods, the defendant was justified in canceling the contract for the future.<sup>164</sup> So, a liquor dealer, who has failed to pay the tax and file the bond required by law, is not in a condition to perform a contract by which he accepts the sole agency for the sale in a certain locality of the beer manufactured by a brewing company, and the company, on ascertaining such inability, may rescind the contract.<sup>165</sup> And it appears that when a building contractor fails to prosecute the work under his contract, and informs the owner that the reason is his inability to get mechanics, the owner may rescind.<sup>166</sup> And the case is the same where one who has contracted to sell his share in a certain mine has parted with his interest in the property to a corporation which is insolvent.<sup>167</sup> But the inability to perform must be clearly and definitely established. In a case where the defendant had attempted to cancel or abandon a contract by which the plaintiff had undertaken to handle and sell defendant's manufactures, it was held that the latter was not justified in such a course, because it had shown only an action on the part of the plaintiff which amounted at most to a determination to ascertain at what price its business could be sold for, and which did not war-

<sup>163</sup> *Lawrence v. Simons*, 4 Barb. (N. Y.) 354; *Sugg v. Blow*, 17 Mo. 359; *Thomas v. Todd*, 3 Litt. (Ky.) 337.

<sup>164</sup> *Napier v. Spielmann*, 127 App. Div. 711, 111 N. Y. Supp. 1009.

<sup>165</sup> *Niagara Falls Brewing Co. v. Wall*, 98 Mich. 158, 57 N. W. 99.

<sup>166</sup> *McGonigle v. Klein*, 6 Colo. App. 306, 40 Pac. 465.

<sup>167</sup> *Burbank v. Pierce*, 26 La. Ann. 295.

rant the inference that it was unable to carry on its business, or its intention to sell out.<sup>168</sup> So, equity will not cancel a conveyance of the grantor's property in consideration of the grantee's undertaking to support and maintain the grantor and not to part with the property, merely because it is shown that the grantee is a poor man, when it also appears that the grantor is eighty-six years old, and that the agreement is unbroken up to the time of suit and is sustained by an offer of continued performance.<sup>169</sup> And even where a definite and positive inability to perform is established, while this will give a right of rescission to the other party, it does not follow that the party so disabled will equally be entitled to abandon the contract. It is said, for instance, that equity will not relieve a party to a contract which is fair and reasonable in its terms, because he has placed himself in a predicament by agreeing to convey more than he had a right to, when there were no misrepresentations, overreaching, mental incompetence, or undue influence.<sup>170</sup> And so, the fact that the vendee in an executed contract is without means with which to pay for the land, without selling or mortgaging it, and is unable to raise money in that way on account of defects in the title, furnishes no ground for rescinding the contract.<sup>171</sup>

§ 207. **Insolvency of Purchaser.**—Within the meaning of the rule just stated, it is clear that the insolvency of a party to a contract which requires him to pay money may constitute (or evidence) such an "inability to perform" as will give a right of rescission to the other party. And it has been held in several of the cases that the vendor of real or personal property is justified in treating the contract as abandoned when the insolvency of the purchaser, or his total inability to pay the price, has been definitely established.<sup>172</sup> But in a few states it is held that one selling land

<sup>168</sup> *John Hetherington & Sons v. William Firth Co.*, 210 Mass. 8, 95 N. E. 961.

<sup>169</sup> *Hetrick's Appeal*, 58 Pa. 477.

<sup>170</sup> *Roche v. Osborne* (N. J. Ch.) 69 Atl. 176.

<sup>171</sup> *Buford's Adm'r v. Guthrie*, 14 Bush (Ky.) 677.

<sup>172</sup> *Stratton v. California Land & Timber Co.*, 86 Cal. 353, 24 Pac. 1065; *Abney v. Brownlee*, 1 A. K. Marsh. (Ky.) 240; *Tiernan v.*

and taking notes for the purchase money, which are not paid at maturity, is not entitled to a cancellation and recovery, on the sole ground of the purchaser's insolvency, without showing that the same occurred after the contract was made,<sup>173</sup> and that it is no cause for the rescission of a contract for the sale of goods that the purchaser becomes insolvent, and is unable to pay for those delivered, in the absence of fraud.<sup>174</sup> Aside from these exceptions, the rule has sometimes been applied in cases other than those involving sales. Thus, where a note was given as the price of a scholarship in an incorporated academy, and the academy became insolvent and ceased to impart instruction, it was held that a case was made for the cancellation of the contract and the surrender of the note.<sup>175</sup> And in another case, it was thought that a subcontractor might have been entitled to disaffirm a contract to furnish building material on account of the insolvency of the general contractor, but that his failure to repudiate after acquiring knowledge of the facts, and his acts in calling on the owner for aid in collecting the money due him and in filing a mechanic's lien, constituted a ratification of the contract.<sup>176</sup> But in the case of contracts involving reciprocal performance of obligations on both sides, other than the payment of money, and especially where there has been a partial performance and the restoration of the status quo would be difficult or impossible, a party who undertakes to rescind on account of the other's insolvency and personal inability to continue stands on perilous ground. For, as it has been pointed out by a federal court, "as a legal proposition, insolvency or bankruptcy alone does not, in a contract of this kind, constitute either a breach or authorize its rescission or abandonment, for it may be finally and fully performed by oth-

Roland, 15 Pa. 429; *Todd v. Caldwell*, 10 Tex. 236. The insolvency of a purchaser of goods on credit, coupled with a secret intention on his part not to pay for them, constitutes such fraud as will justify rescission and the reclamation of the goods. See, *supra*, § 31.

<sup>173</sup> *Jordan v. Beal*, 51 Ga. 602.

<sup>174</sup> *Holland v. Cincinnati Dyeing Co.*, 97 Ky. 454, 80 S. W. 972.

<sup>175</sup> *Mary Washington Female College v. McIntosh*, 37 Miss. 671.

<sup>176</sup> *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 837.

ers who may be acting, for instance, as trustees or as successors or purchasers of the bankrupt's property and rights involved therein or affected thereby." <sup>177</sup> But in any event, if insolvency may constitute a ground for rescission, it must be definite and complete. Thus, one who has contracted to purchase land cannot repudiate his contract on the ground that the vendor is financially embarrassed and is indebted to various persons whose claims (not being liens on the property) are not provided for in the trust deed under which the sale is made. <sup>178</sup>

Insolvency followed by an adjudication of bankruptcy may in some cases be regarded as the equivalent of disablement to perform a contract and a repudiation of it, or as an anticipatory breach of the contract. <sup>179</sup> Thus, when a purchaser of goods sold on credit becomes bankrupt before the vendor has parted with the possession of the goods, the latter, in case the trustee in bankruptcy does not elect to complete the contract by paying the price within a reasonable time, may treat the contract as broken and resell the goods. <sup>180</sup>

§ 208. **Impossibility of Performance.**—When performance of a contract by one of the parties is inherently impossible, or has become impossible in consequence of events occurring after the making of the contract, it is generally the right of the other party to rescind. <sup>181</sup> For instance, where a contract is for the sale of 2,000 acres of "first-rate" land, to be chosen by the purchaser out of various tracts

<sup>177</sup> *In re Morgantown Tin Plate Co.* (D. C.) 184 Fed. 109, 113.

<sup>178</sup> *Jacobs v. Morrison*, 136 N. Y. 101, 32 N. E. 552.

<sup>179</sup> *Black, Bankruptcy*, § 495. And see, *infra*, § 327.

<sup>180</sup> *Ex parte Stapleton*, 10 Ch. Div. 586.

<sup>181</sup> *Williams v. Smith*, 2 Root (Conn.) 464; *Milligan v. Poole*, 35 Ind. 64; *Johnson County Sav. Bank v. Mendell*, 36 App. D. C. 413; *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520. In a case in Georgia, it is said that the possibility or probability of the performance of many contracts is dependent upon so many contingencies, that it is only in an extreme case that a given contract can be said as a matter of law to be so incapable of performance as to evidence a purpose to defraud. *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177. Justification for the abandonment of a contract may be found in the imposition of terms by the other party which are impossible of performance. See *Rhinevault v. Barrett*, 185 Ill. App. 423.

owned or claimed by the vendor, the purchaser may have the contract vacated on showing that the vendor does not own any land of that description and therefore is unable to comply with his contract.<sup>182</sup> So, where persons contracting to sell goods to arrive by a designated vessel knew that the goods were not on board the vessel, the purchaser may recover in an action of deceit whatever damages he has sustained.<sup>183</sup> Sometimes also the person who is prevented by an unexpected difficulty from fulfilling his contract may claim the right of rescinding. This was held in a case where a contract was made for a conveyance of real estate and the assignment of a mortgage which was owned by a third person. The vendor being unable to obtain a voluntary assignment of the mortgage, it was held that he might rescind and tender a return of the money paid, although he could have obtained an equitable assignment by paying off the mortgage.<sup>184</sup> And again, where one of the essential considerations of a lease was the adding of two stories to the building by the lessee, without which he could not afford to pay the stipulated rent, and both parties honestly believed that the building would support the addition, but plans were drawn after the execution of the lease and it was then discovered that this could not be done, it was held that the lessee was entitled in equity to a rescission of the contract.<sup>185</sup> And it should be observed that a provision in a contract that a partial payment made thereon shall be returned in a certain contingency does not preclude its recovery by the party making it, on the happening of another contingency, not provided for, which prevents performance of the contract by the other party.<sup>186</sup> But there are cases in which the person promising performance must be held to have taken the risk of anything which may render performance impossible. This was ruled, for instance, in a case where a coal mine was leased for a term of years, the rent to be paid in the form of a royalty which should amount

<sup>182</sup> *Lynch v. Johnson*, 2 Litt. (Ky.) 98.

<sup>183</sup> *Heller v. Herbst*, 1 City Ct. R. Supp. (N. Y.) 72.

<sup>184</sup> *Allen v. Alden*, 109 Me. 516, 85 Atl. 3.

<sup>185</sup> *Hoops v. Fitzgerald*, 204 Ill. 325, 68 N. E. 430.

<sup>186</sup> *Seibel v. Purchase* (C. C.) 134 Fed. 484.



to not less than a stipulated sum each year. It was held to be no defense to an action by the lessor that the coal in the mine could not be extracted by any practised or practicable method of mining, no provision for this case having been made in the contract.<sup>187</sup>

Another case of impossibility of performance arises where a contract is entire, and involves the rendition of personal services or the doing of particular work, which could not be equally well performed by any third person, or where the party for whom the services are to be rendered or the work done places special reliance upon the knowledge, skill, or other personal qualities of the other party, or would not have made the same contract with any stranger, and such a contract is interrupted by the death of the promisor. Here the rule is that no liability attaches as against the estate of the decedent, but that the other party may rescind the contract, upon offering to pay a quantum meruit for so much as has been performed, and he is not obliged to accept a substitute and allow him to complete the contract.<sup>188</sup> Thus, where an attorney at law took a conveyance of land to secure his fee for services to be performed in certain specified cases, of which services his death prevented more than a partial performance, it was held that a bill would lie against his estate to set aside the conveyance, upon a tender of so much of the fee agreed upon as was found to have been earned.<sup>189</sup> So, a sale of goods upon credit to a particular member of a firm, for the partnership, but upon the express understanding that he shall personally attend to their sale, may be rescinded upon the death of such partner.<sup>190</sup>

But to justify the termination of a contract on account of impossibility of performance, the impossibility must be complete and permanent. A temporary interruption in the execution of a contract, or in the performance of work or

<sup>187</sup> *Beattie v. Rocky Branch Coal Co.*, 56 Mo. App. 221.

<sup>188</sup> *Williams v. Butler*, 58 Ind. App. 47, 105 N. E. 387, 107 N. E. 300; *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Patrick v. Putnam*, 27 Vt. 759; *Hall v. Wright*, El., Bl. & El. 791; *Robinson v. Davison*, L. R. 6 Exch. 269.

<sup>189</sup> *Callahan v. Shotwell*, 60 Mo. 398.

<sup>190</sup> *Fulton v. Thompson*, 18 Tex. 278.

services agreed to be maintained continuously, will not warrant a rescission where it results from no fault or neglect of either of the parties, but from the operations of nature or other unavoidable accident, and especially where it causes no substantial loss, and does not jeopardize the further continuance and completion of the contract.<sup>191</sup> And again, the fact that the accomplishment of an undertaking proves to be more difficult than was supposed at first, or that obstacles have arisen which render its completion uncertain or even improbable, does not justify the party in rescinding or withdrawing from it, but it must appear that the undertaking cannot by any means be performed.<sup>192</sup> Thus, a building contractor is not excused from performance by the fact that there was a defect in the soil which rendered necessary a greater amount of work than was contemplated when the contract was made.<sup>193</sup> Furthermore, no one can claim the right to rescind his contract on the ground that it has become impossible for him to perform it, until he has at least made a bona fide attempt or effort to perform.<sup>194</sup> Of course, there may be cases in which the alleged impossibility arises from physical causes or conditions which are apparent to everyone, and of such a nature that any person of ordinary intelligence could see the futility of attempting to overcome them. But the rule we have just stated applies in instances where the impossibility of an undertaking cannot be definitely asserted until a trial has been made, as, for example, in cases where it depends upon the will or the actions of a third person. Thus, where a contract for the erection of a building provides that any errors in the plans shall be referred to the architect before the work is proceeded with, the contractor cannot justify a rescission of the contract on the ground that there are errors in the plans which make it impossible to erect the

<sup>191</sup> *Buffalo & L. Land Co. v. Bellevue Land & Improvement Co.*, 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951; *Lachmund v. Lope Sing*, 54 Or. 106, 102 Pac. 598; *Alexander v. Alexander*, 8 Ala. 796; *Asplund v. Mattson*, 15 Wash. 328, 46 Pac. 341.

<sup>192</sup> *Berry v. Wells*, 43 Okl. 70, 141 Pac. 444.

<sup>193</sup> *Ford & Denning v. Shepard Co.*, 36 R. I. 497, 90 Atl. 805. And see *Becker v. City of Philadelphia (Pa.)* 16 Atl. 625.

<sup>194</sup> *Tuohy v. Moore*, 133 Cal. 516, 65 Pac. 1107.

building according to the plans, where he has not called the architect's attention to the defects and asked for a correction.<sup>195</sup> And again, one cannot plead impossibility of performance as a ground for rescission, where the difficulty has been remedied by the other party, or the particular detail as to which the impossibility was alleged has been rendered possible by such party.<sup>196</sup>

Impossibility justifying rescission may also arise by operation of law, and this is the case where the particular thing contracted for was lawful at the time the contract was made, but has since been absolutely prohibited by law.<sup>197</sup> Thus, a contract for the erection of buildings may be rendered legally impossible, so as to warrant rescission, by changes in the building laws, by the enactment of a law prohibiting the construction of buildings of the kind contemplated within the district where it was proposed to build, or prohibiting the erection of buildings for certain specified uses, or by an ordinance opening a street through the lot where the building was to stand.<sup>198</sup> So, where one sold land to a state on an agreement that certain public buildings should be erected thereon, but the statute authorizing such buildings, on which both parties relied, was subsequently adjudged unconstitutional, it was held that the grantor should rescind, offering a return of the purchase money paid, before suing for a cancellation of the deed.<sup>199</sup> On the same principle, a subscription for the purchase of stock in a corporation may be rescinded when it is discovered that the corporation cannot perform its undertaking without issuing stock in violation of law.<sup>200</sup> And where a complainant contracted to purchase realty from certain executors, and, after making the first payment and securing the others, discovered that the executors had no power

<sup>195</sup> *Gibbs v. Girardville School Dist.*, 195 Pa. 396, 46 Atl. 91.

<sup>196</sup> *Cronin v. Tebo*, 144 N. Y. 660, 39 N. E. 344.

<sup>197</sup> *Rooks v. Seaton*, 1 Phila. (Pa.) 106; *Jones v. Judd*, 4 N. Y. 412; *Bally v. De Crespigny*, L. R. 4 Q. B. 180.

<sup>198</sup> *Hanover Building Co. v. Jacobs*, 78 Misc. Rep. 410, 138 N. Y. Supp. 369; *Rooks v. Seaton*, 1 Phila. (Pa.) 106; *Heaver v. Lanahan*, 74 Md. 493, 22 Atl. 263.

<sup>199</sup> *State v. Blize*, 37 Or. 404, 61 Pac. 735.

<sup>200</sup> *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

under the will to make a deed, it was held that he was entitled to rescind, and this although the executors offered to indemnify him and to procure power from the court to make a conveyance.<sup>201</sup> Notwithstanding that these principles are well settled, it has been held in certain cases that a lease of property for a drinking saloon is not terminated or rescinded, nor the liability to pay rent released, by the adoption of local option in the given territory, rendering the sale of liquors illegal, at least where the privilege of local option was given by a statute in force at the time the lease was made.<sup>202</sup>

§ 209. **Same; Destruction or Perishing of Subject-Matter.**—In contracts in which the performance depends on the continued existence of a given person or thing, there is an implied condition that an impossibility of performance arising from the perishing of the person or thing shall excuse the performance, and hence the destruction or loss of the property which is the subject-matter of the contract, or the agency by which it is to be carried out, if occurring without fault, discharges the contract or authorizes its rescission.<sup>203</sup> In a leading English case it was said: "The authorities establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless, when the time for the fulfillment of the contract arrived, some particular thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, the con-

<sup>201</sup> *Potter v. Ranlett*, 116 Mich. 454, 74 N. W. 661.

<sup>202</sup> *Hyatt v. Grand Rapids Brewing Co.*, 168 Mich. 360, 134 N. W. 22; *Koen v. Fairmont Brewing Co.*, 69 W. Va. 94, 70 S. E. 1098; *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N. S.) 432.

<sup>203</sup> *Taylor v. Caldwell*, 3 Best & S. 826; *Appleby v. Myers*, L. R. 2 C. P. 651; *Steamboat Co. v. Transportation Co.*, 166 N. C. 582, 82 S. E. 956; *Powell v. Dayton, S. & G. R. R. Co.*, 12 Or. 488, 8 Pac. 544. See *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253.

tract becomes impossible from the perishing of the thing without the default of the contractor.”<sup>204</sup> Thus, for instance, where the owner of a vessel agrees to carry a cargo, the destruction of the vessel by the perils of the sea is a sufficient excuse for breach of the contract.<sup>205</sup> We have already considered these questions from the point of view of impossibility of performance bringing about a failure of consideration, with a consequent right of rescission on the last-named ground,<sup>206</sup> and the reader is referred to the section cited for an exposition of the rules which govern in case of the destruction by fire of a building which is under lease or which is the subject of an unexecuted contract of sale, and also the rules which apply in the case of mining leases and contracts, where the ore which forms the basis of the contract becomes exhausted or is found to be non-existent or unworkable.

**§ 210. Effect of Party's Disabling Himself to Perform.** Where one of the parties to a contract, before the time for performance arrives, has placed himself, by his voluntary act or conduct, in such a situation that he is unable to fulfill his part of the agreement, it may be treated as an anticipatory breach of the contract or as a case of impossibility of performance subsequently arising; and in either view, the other party to the contract may thereupon rescind it and recover whatever consideration he may have given under it, or treat it as abandoned, and sue at once for such damages as he may have sustained.<sup>207</sup> The inability to perform need not relate to the whole and every part of the contract, but it must exist with reference to some substantial particular, going to the very essence of the contract and de-

<sup>204</sup> *Taylor v. Caldwell*, 3 Best & S. 826.

<sup>205</sup> *Furness, Withy & Co. v. Randall*, 124 Md. 101, 91 Atl. 797.

<sup>206</sup> *Supra*, § 160.

<sup>207</sup> *Russell v. Gregory*, 62 Ala. 454; *Alkman v. Murphy*, 122 Cal. xviii, 55 Pac. 1099; *Treat v. Smith*, 139 Ill. App. 262; *Smith v. Treat*, 234 Ill. 552, 85 N. E. 289; *Shaffner v. Killian*, 7 Ill. App. 620; *O'Neill v. Supreme Council*, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 432; *Frost v. Clarkson*, 7 Cow. (N. Y.) 24; *De Peyster v. Pulver*, 3 Barb. (N. Y.) 284; *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084; *Selpel v. International Life Ins. Co.*, 84 Pa. 47; *South Texas Telephone Co. v. Huntington* (Tex. Civ. App.) 121 S. W. 242.

feating its main purpose and object, or to a part so essential to the residue of the contract that it cannot reasonably be supposed that the other party would have made the contract without it.<sup>208</sup> Inability of a party to fulfill his contract in respect to an immaterial part, the performance of which would in no way benefit the other party, is no ground for rescission, where compensation can be given and is offered for the default.<sup>209</sup> But assuming the materiality of the engagement which the party has disabled himself from performing, as soon as the disability is definitely ascertained, a right of rescission accrues, and it is not necessary for the party rescinding to tender a performance on his own part before taking measures to free himself from the contract.<sup>210</sup> Thus, where one of the parties to the contract, before the time for performance, requests an adjustment, and thus recognizes his inability to perform the contract, the other party may act on such declaration, and rescind, without waiting until the arrival of the day fixed for performance.<sup>211</sup>

A forcible illustration of the application of these rules may be seen in the case where a man obtains property from a woman in consideration of his promise to marry her, but marries another woman, thereby of course disabling himself from keeping his promise.<sup>212</sup> So, where two partners agree that certain real estate of the firm shall be assigned to one of them as his separate property, but subsequently they divest themselves of their title thereto by deeds to third parties, thus disqualifying themselves from executing their agreement, the contract is annulled.<sup>213</sup> So, where a railroad subcontractor has agreed to subscribe for certain amounts of stock and bonds of the railroad company, and to accept from the principal contractor such stock and bonds at their par value, in part payment of the work to be done, and thereafter the principal contractor pledges all the stock and bonds to a third party, so as to disable himself

<sup>208</sup> *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084; *South Texas Telephone Co. v. Huntington* (Tex. Civ. App.) 121 S. W. 242.

<sup>209</sup> *Foley v. Crow*, 37 Md. 51.

<sup>210</sup> *Seibel v. Purchase* (C. C.) 134 Fed. 484.

<sup>211</sup> *Follansbee v. Adams*, 86 Ill. 13.

<sup>212</sup> *Frazer v. Boss*, 66 Ind. 1.

<sup>213</sup> *Jones v. Neale*, 2 Pat. & H. (Va.) 339.

from making delivery thereof, this amounts to a repudiation of the subscription contract, and gives the subcontractor a right to treat it as rescinded.<sup>214</sup> Again, the contract embodied in a life insurance policy in the ordinary form is violated by the insurance company when it transfers all its assets to another company and ceases to do business.<sup>215</sup> And on the same principle, where an insurance company doing business on the endowment plan, without the knowledge or consent of the plaintiff, a policy holder, obtained an act of the legislature enabling it to abandon such plan and to adopt the "straight insurance system," and induced some of its members to surrender their old certificates, thereby reducing the funds to which the plaintiff had to look for the payment of the endowments contracted for in his policy, it was held that he had a right to maintain an action for the rescission of the contract of insurance and to recover back the assessments paid thereon.<sup>216</sup>

But it should be noticed that the party who has voluntarily disabled himself from performing his contract cannot claim a right to rescind it. He must abide the consequences of what he has done; the right of rescission belongs alone to the other party. Thus, a corporation cannot recover back its stock and bonds, delivered to a contractor on his agreement to construct a railroad on a right of way to be furnished by it, on the ground that they were all the assets it had, and that it has no means to procure the right of way.<sup>217</sup>

**§ 211. Sale of Subject-Matter to Third Party.**—One who has contracted to sell a piece of property, whether real or personal, to another, and who sells or transfers the same property to a third person, while the contract still remains in force and executory, violates the contract by disabling himself from performing it, and thereby gives to the other party the right to rescind it or treat it as abandoned and to recover whatever he may have given in consideration of

<sup>214</sup> *Reynolds v. Manhattan Trust Co.*, 83 Fed. 593, 27 C. C. A. 620.

<sup>215</sup> *Meade v. St. Louis Mut. Life Ins. Co.*, 51 How. Prac. (N. Y.) 1. And see *Selpel v. International Life Ins. Co.*, 84 Pa. 47.

<sup>216</sup> *People's Mut. Ins. Fund v. Bricken*, 92 Ky. 297, 17 S. W. 625.

<sup>217</sup> *Hudson River & W. C. M. R. Co. v. Hanfield*, 36 App. Div. 605, 55 N. Y. Supp. 877.



it.<sup>218</sup> This rule has been most commonly applied in the case of sales of real estate. But it applies equally to sales of personalty and to contracts for the grant of licenses, privileges, or incorporeal rights. Thus, in a case in the United States courts, a contract granting an exclusive right to produce a series of moving picture films was held to have been broken by the licensor, by granting the right to exhibit the films to another, while the licensee was negotiating with the municipal authorities to avoid the necessity of eliminating certain scenes which they had ordered cut out.<sup>219</sup>

But in order that this rule should be applied, it is necessary that the sale or transfer to the third person should be such as effectually to preclude the grantor from fulfilling his original contract. Thus, the proposed purchaser of land cannot rescind the contract in consequence of a conveyance to a third person which is entirely void,<sup>220</sup> nor, perhaps, where the transfer is alleged to have been fraudulent and to have been taken by the third party with notice of the contract purchaser's rights.<sup>221</sup> And an entry of judgment for the plaintiff in a suit to quiet title, involving land which the defendant had contracted to sell, is no ground for rescission by the vendee until the vendor has refused, on a proper tender, to perform his contract.<sup>222</sup> So, where a corporation which is composed of only two stockholders undertakes to convey certain land, no cause for rescission arises out of their acts in subsequently dissolving the corporation and forming a partnership to continue the business, and conveying the land from the corporation to themselves individual-

<sup>218</sup> *Vance v. McBurnett*, 94 Ga. 251, 21 S. E. 520; *Warren v. Richmond*, 53 Ill. 52; *Jones v. Miller*, 44 Ill. 181; *Auxier v. Taylor*, 102 Iowa, 673, 72 N. W. 291; *Little v. Thurston*, 58 Me. 86; *Ft. Payne Coal & Iron Co. v. Webster*, 163 Mass. 134, 39 N. E. 786; *Atkinson v. Scott*, 36 Mich. 18; *James v. Burchell*, 7 Daly (N. Y.) 531; *Smith v. Rogers*, 42 Hun (N. Y.) 110; *Utter v. Stuart*, 30 Barb. (N. Y.) 20; *Brodhead v. Reinbold*, 200 Pa. 618, 50 Atl. 229, 86 Am. St. Rep. 735. See *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 259, 33 Pac. 848.

<sup>219</sup> *Jesse L. Laskey Feature Play Co. v. Celebrated Players' Film Co.* (D. C.) 214 Fed. 861.

<sup>220</sup> *Clanton v. Burges*, 17 N. C. 13.

<sup>221</sup> *Borough of Woodridge v. Borough of Carlstadt*, 60 N. J. Eq. 1, 46 Atl. 540.

<sup>222</sup> *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, 70 Pac. 82.

ly, when this is not done in order to evade the contract, but rather to facilitate its performance.<sup>223</sup> But on the other hand, where a vendor, after contracting to convey, mortgages the land to a third person and suffers the mortgage to be foreclosed and the purchaser evicted, the latter is entitled to rescind,<sup>224</sup> and so also, it appears, without a foreclosure, if the mortgagor becomes insolvent.<sup>225</sup> But a sale and transfer of the property to a third person does not warrant a rescission when the conveyance is expressly made subject to the vendee's rights under the contract,<sup>226</sup> or when the third person taking the conveyance knows of and recognizes the rights of the contract purchaser, and is willing to carry out the contract and convey to him.<sup>227</sup> And it is held in Nebraska that the purchaser of land under a contract which is duly executed and recorded is not entitled to rescind the contract merely because the vendor subsequently conveys the land to another, as such other takes the land subject to the contract.<sup>228</sup> And generally, the disappointed purchaser must be able to show that he has suffered or will suffer some loss or damage from the acts of his grantor in dealing with third persons. Thus, under a contract for the sale of malt, by which it was agreed that the seller would not quote prices on malt to other persons in the buyer's state, a sale of malt to another party in that state does not entitle the buyer to rescind, unless he can show that it prevented him from selling at a satisfactory price the malt purchased by him.<sup>229</sup>

Whether or not the sale to a stranger of a portion of that which was contracted to be conveyed will justify rescission is not entirely clear. That it will warrant such a course has been laid down in general terms.<sup>230</sup> It would seem that

<sup>223</sup> *Tanzer v. Bankers' Land & Mortgage Corp.*, 159 App. Div. 351, 144 N. Y. Supp. 613.

<sup>224</sup> *Hawkins v. Merritt*, 109 Ala. 261, 19 South. 589.

<sup>225</sup> *Siglin v. Frost*, 173 Mass. 284, 53 N. E. 820.

<sup>226</sup> *Van Dyke v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103; *Williams v. Champion*, 6 Ohio, 169.

<sup>227</sup> *Foxley v. Rich*, 35 Utah, 162, 99 Pac. 666; *Johnson v. Olberg*, 82 S. D. 346, 143 N. W. 292.

<sup>228</sup> *Hock v. Bowman*, 42 Neb. 87, 60 N. W. 391.

<sup>229</sup> *Mayo v. American Malting Co.*, 211 Fed. 945, 128 C. C. A. 443.

<sup>230</sup> *Adams v. Bridges*, 141 Ga. 418, 81 S. E. 203.

such a rule should certainly be applied in cases where the portion sold was the most valuable part of the property, or a part which was essential to the complete enjoyment of the rest. And accordingly, where one contracted to sell a lot of land with a hotel on it, which was supplied with water from a spring also owned by the grantor, and stipulated to grant the privilege of the water works "as they now are," but afterwards sold the spring and the intervening lands to a stranger, it was held that the purchaser was justified in rescinding.<sup>281</sup> It is also necessary to draw a distinction between cases where the subject of the sale is the land itself and cases where it is the product of the land. In a case in Oregon, the plaintiff contracted to sell and deliver to defendant a certain quantity of hops to be grown on plaintiff's land, during each of the following five years. The plaintiff afterwards sold the land, but it did not appear that the purchaser was unable or unwilling to continue and complete the contract, and it was held that there was no such breach of the contract as justified rescission by the defendant.<sup>282</sup> But on the other hand, a decision in Illinois is to the effect that a contract by the owner of a mine for the sale and delivery of coal from the mine, is repudiated by a sale of the mine to a third person.<sup>283</sup>

The time of making the transfer to a third person may also be of prime importance. On the one hand, a person who has contracted to sell and convey property is not justified in disposing of it to a third person until he has in some way put the original purchaser in default. It is said that if there is a fixed term of credit, the owner of the property cannot sell it to a stranger before the expiration of that term, or if there is no such term fixed, then he is not warranted in selling to a stranger unless he first gives the contract purchaser due notice and an opportunity to acquire the property by paying the price.<sup>284</sup> If the subject of sale

<sup>281</sup> *Durrett v. Simpson's Representatives*, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115.

<sup>282</sup> *Krebs Hop Co. v. Livesley*, 51 Or. 527, 92 Pac. 1084.

<sup>283</sup> *Hunter W. Finch & Co. v. New Ohio Washed Coal Co.*, 156 Ill. App. 589.

<sup>284</sup> *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665, 26 C. C. A. 75.

is real estate, and there is a clause in the contract for forfeiture for non-payment, the vendor cannot safely dispose of the property elsewhere without taking steps to declare a forfeiture.<sup>285</sup> But he is not obliged to wait indefinitely for a dilatory purchaser to pay his money. If the purchaser's default in payment has continued for an unreasonably long time, he may be estopped to object to the sale of the property to a stranger, or to claim it for himself under his contract, especially if the property has in the mean time greatly increased in value,<sup>286</sup> or if there are circumstances tending to show that such purchaser acquiesced in the sale of the property by his proposed vendor.<sup>287</sup> On the other hand, it has been said that the purchaser is not justified in treating the contract as abandoned until the time for its performance arrives, although the vendor may in the mean time have conveyed the property away, presumably because of the possibility that he may regain the title.<sup>288</sup> In a case in New York, however, it was held that a purchaser in this situation might rescind as soon as the land was conveyed to a third person, and that it was immaterial that the latter had conveyed it back to the grantor before the time when the purchaser was bound to take it and pay for it under the original contract.<sup>289</sup> It should be added that a vendee under a contract of sale waives his right to rescind by reason of a conveyance of the land by the vendor to another, who took subject to such contract, where, with knowledge of the facts, he negotiates with him as to the payments under the contract.<sup>290</sup>

**§ 212. Breach of Covenant or Condition, in General.**—It has been stated in general terms that the breach of a condition or covenant in a contract is no sufficient reason for its rescission in equity, in the absence of fraud, mistake, or

<sup>285</sup> *Musham v. Musham*, 87 Ill. 80.

<sup>286</sup> *Evans v. Bentley*, 9 Tex. Civ. App. 112, 29 S. W. 497, 36 S. W. 1070.

<sup>287</sup> *Moran & Co. v. Palmer*, 36 Wash. 684, 79 Pac. 476.

<sup>288</sup> *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857.

<sup>289</sup> *James v. Burchell*, 82 N. Y. 108. And see *Nes v. Union Trust Co.*, 104 Md. 15, 64 Atl. 310.

<sup>290</sup> *Kreibich v. Martz*, 119 Mich. 343, 78 N. W. 124.

some other independent ground of equitable relief.<sup>241</sup> But the best authorities make a distinction in this respect between dependent and independent covenants. A dependent covenant is one which goes to the whole consideration of the contract, and the breach of such a covenant gives to the injured party the right to rescind the contract, or to treat it as broken and to recover damages for a total breach; but the breach of an independent covenant—a covenant which does not go to the whole consideration of the contract, but which is subordinate and incidental to its main purpose—does not constitute a breach of the entire contract, nor warrant its rescission by the injured party, but the latter is still bound to perform his part of the contract, and his only remedy for the breach is compensation in damages.<sup>242</sup> These principles have been more fully stated as follows: “Where the undertaking on one side is, in terms, a condition to the stipulation on the other (that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening), the conditions are conditions precedent. The reason and the sense of the contemplated transaction as it must have been understood by the parties, and is to be collected from the whole contract, determines whether this is so or not, or it may be determined from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The non-performance on one side must go to the entire substance of the contract and to

<sup>241</sup> *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890; *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104.

<sup>242</sup> *Oscar Barnett Foundry Co. v. Crowe*, 219 Fed. 450, 135 C. C. A. 162; *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; *Howe v. Howe & Owen Ball Bearing Co.*, 154 Fed. 820, 83 C. C. A. 536; *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884.

the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that, if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and in all cases where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded, rather than the technical sense of the words used.”<sup>243</sup>

Applying these principles, it is held that one who executes a conditional agreement to sell land, importing an obligation to transfer title after the performance of certain conditions by the vendee, is entitled to rescind and re-enter after the vendee's failure to perform.<sup>244</sup> So, where a contract for the sale of land authorizes the vendor to forfeit it on the purchaser's failure to fence and cultivate as therein required, the condition is essential and its breach warrants a rescission.<sup>245</sup> Again, where the plaintiff, a chemical engineer, entered the employment of defendant, a manufacturer, agreeing to devote his entire time and skill to the defendant's business for three years at a salary fixed by the contract, and it was further stipulated that any inventions or discoveries made by plaintiff during the term and relating to the manufactures contemplated should be disclosed to defendant, and if deemed advisable should be patented at his expense for the joint and equal benefit of the parties, it was held that this stipulation was an essential part of the

<sup>243</sup> *Huggins v. Daley*, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320. And see *New Orleans v. Texas & P. Ry. Co.*, 171 U. S. 334, 18 Sup. Ct. 875, 43 L. Ed. 178; *Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; *Green Mountain Falls Town & Improvement Co.*, 22 Colo. 225, 43 Pac. 1036.

<sup>244</sup> *Baldwin v. Morey*, 41 La. Ann. 1105, 6 South. 796.

<sup>245</sup> *Benham v. Columbia Canal Co.*, 74 Wash. 110, 132 Pac. 884.

consideration of the obligations assumed by the defendant, and constituted an implied condition, a breach of which by the plaintiff justified the termination of the entire contract by the defendant.<sup>246</sup> And a similar ruling was made in a case where the owner of a patent granted to another the sole right to manufacture and sell the patented articles, in consideration of the payment of a royalty and other agreements, but afterwards proceeded, without cause of complaint against his grantee, to manufacture and sell the patented articles on his own account at reduced prices.<sup>247</sup> So, where a landlord fails to perform a covenant to adapt the premises to the tenant's business, the tenant has a right to rescind.<sup>248</sup> And where the furnishing of electricity to light the streets of a city day by day and continuously is a condition precedent to the continuance of the obligation of the contract, the city may rescind the contract on the neglect of the contractor to furnish the current.<sup>249</sup> For similar reasons, where one subscribes for stock in a proposed corporation, the legal organization of the corporation is a condition precedent to any obligation on his part to pay the agreed price, and its failure to effect this justifies him in rescinding.<sup>250</sup> So again, where part of the purchase price of land is to be paid in work performed by the vendee, in cutting and transporting the timber standing on it, there is an implied covenant on the part of the vendor that he will permit the vendee to cut the timber, and if he refuses to do so, the vendee will be entitled to rescind the contract.<sup>251</sup> And the rule applies also in cases where it is made a part of the contract of sale of goods that the freight charges shall not exceed a certain sum,<sup>252</sup> that the articles composing a stock of goods shall be put in at their cost or invoice price,<sup>253</sup> that mer-

<sup>246</sup> *Watson v. Ford*, 93 Fed. 359, 35 C. C. A. 345.

<sup>247</sup> *Brusle v. Peck Bros. & Co.*, 54 Fed. 820, 4 C. C. A. 597.

<sup>248</sup> *Taylor v. Dinsmore*, 68 Misc. Rep. 143, 124 N. Y. Supp. 936.

<sup>249</sup> *Mills v. City of Osawatimie*, 59 Kan. 463, 53 Pac. 470.

<sup>250</sup> *Manistee Lumber Co. v. Union Nat. Bank*, 143 Ill. 490, 32 N. E. 449.

<sup>251</sup> *French v. Bent*, 43 N. H. 448.

<sup>252</sup> *Johnson v. Latimer*, 71 Ga. 470.

<sup>253</sup> *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 969.



chandise sold shall be measured at the point of shipment and payment made accordingly,<sup>254</sup> or that the purchaser of land shall pay half the cost of surveying the premises or of procuring title thereto.<sup>255</sup> And in a case where a guarantor, to whom the buyer had transferred the property as security, repudiated his guaranty, it was held that the seller was entitled to treat the contract of sale as rescinded, even though the guaranty might still be binding and enforceable.<sup>256</sup> But here, as in other cases of non-performance, prevention of performance by the wrongful act of the other party is an excuse, and one cannot found any right to rescind on the breach of a covenant or condition precedent when that breach was caused by his own opposition, interference, or refusal.<sup>257</sup>

We have also to consider the case where one party agrees to furnish, and the other to buy and pay for, a supply of a given commodity during or within a stipulated period, the quantity not being exactly measured, but depending on the needs or requirements of the buyer. Here there are mutually dependent covenants, and a failure of performance by either party will justify rescission by the other. Thus, the purchaser's failure to demand a full supply of the commodity, or so much as he needs for a given purpose, according to the contract, will give the seller a right to rescind.<sup>258</sup> So, where the defendant contracted to supply the plaintiff with all the new barrels needed during a certain year, at specified prices, such contract was held to imply a covenant that the plaintiff would order only such barrels as were necessary for his business, which was dependent on the defendant's covenant to supply, so that the breach of the plaintiff's covenant, by his ordering barrels with a view to stocking up for another year, and for sale to other parties, constituted a breach of his contract which entitled the

<sup>254</sup> *J. Weller Co. v. Columbia Conserve Co.*, 31 Ohio Cir. Ct. R. 562.

<sup>255</sup> *Hutcheson v. McNutt's Heirs*, 1 Ohio, 14; *Davis v. Terry*, 114 N. C. 27, 18 S. E. 947.

<sup>256</sup> *Blair-Baker Horse Co. v. Hennessey*, 36 R. I. 132, 89 Atl. 299.

<sup>257</sup> *Vollva v. Cook*, 262 Ill. 502, 104 N. E. 711. And see, *supra*, § 205.

<sup>258</sup> *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55; *Frommell v. Foss*, 102 Me. 176, 66 Atl. 382.

defendant to refuse further deliveries and to rescind the contract.<sup>259</sup>

The precise nature of a condition or covenant, however, is not of chief importance when the contract contains an express provision authorizing rescission or a forfeiture for the breach of it. It is within the competence of the parties to take any item or detail of their agreement and make the strict and punctual performance of it an absolute condition precedent; and if the contract provides for a termination or forfeiture on failure to perform such a condition, its rescission will be decreed in a court of equity, at least in the absence of a sufficient excuse for non-performance.<sup>260</sup> And on the other hand, where the contract expressly imposed conditions or limitations on the right to terminate or rescind it, these also will be given effect in equity, if not contrary to the general principles which govern the courts of chancery. Thus, where a building contract makes a certificate of the architect that the contractor is not properly fulfilling his contract, and that a termination thereof is warranted, a condition precedent to the right of the owner to terminate the contract, the condition must be strictly complied with.<sup>261</sup>

A warranty is ordinarily an agreement to be responsible for all damages which may arise from the falsity of the statement or assurance of a fact, and, in the absence of fraud or an agreement to rescind, a contract of sale cannot be rescinded for a mere breach of warranty; but the assurance, although called a warranty, may be in reality the condition on which an executory sale is made, and where it is such a condition, the performance of which is precedent to the completion of the sale, the purchaser may reject the article and rescind the contract if such condition is not performed.<sup>262</sup> But in the case of a machine or other similar

<sup>259</sup> *H. D. Williams Cooperage Co. v. Scofield*, 115 Fed. 119, 53 O. C. A. 23.

<sup>260</sup> *Schumann v. Mark*, 35 Minn. 379, 28 N. W. 927; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

<sup>261</sup> *White v. Mitchell*, 30 Ind. App. 342, 65 N. E. 1061.

<sup>262</sup> See *McCoy v. Prince*, 11 Ala. App. 388, 66 South. 950; *Oliver v. Scott* (Ark.) 174 S. W. 557; *Laser v. Fowler*, 114 Ark. 574, 170 S. W. 223; *Pepper v. Vedova*, 26 Cal. App. 406, 147 Pac. 105; *Gay*

article, to establish a right to rescind the sale, the buyer must show a breach of warranty, as distinguished from a breach of a contract merely to keep in repair.<sup>263</sup> And where there was a breach of warranty in a contract of sale of land before the delivery of the deed, if the purchaser accepts the deed containing the warranty, with knowledge of the breach, his remedy is limited to the recovery of damages.<sup>264</sup>

§ 213. **Same; Conditions Subsequent; Promise of Future Action.**—In numerous cases the courts have refused rescission of a contract on the ground of the breach of a condition subsequent, on the general principle that there is in such cases an adequate remedy at law by an action for damages.<sup>265</sup> But the true rule appears to be that rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted. For example, where a lease contains a provision requiring the lessor to furnish the tenant with steam, heat, and uniform power for the operation of his machinery, a failure to comply justifies the tenant in vacating the premises and refusing to pay rent.<sup>266</sup> So, where a

*Oil Co. v. Roach*, 93 Ark. 454, 125 S. W. 122, 27 L. R. A. (N. S.) 914, 137 Am. St. Rep. 95; *Brooke v. Cole*, 108 Ga. 251, 33 S. E. 849; *Larey v. Tallafarro*, 57 Ga. 443; *Narr v. Norman*, 113 Mo. App. 533, 88 S. W. 122; *Miller v. Nichols*, 5 Neb. 478; *Poirier Mfg. Co. v. Kitts*, 18 N. D. 556, 120 N. W. 558; *Piche v. Robbins*, 24 R. I. 325, 53 Atl. 92; *Dupree v. Savage* (Tex. Civ. App.) 154 S. W. 701; *Crislip v. Cain*, 19 W. Va. 438. *Stevens Tank & Tower Co. v. Berlin Mills Co.*, 112 Me. 336, 92 Atl. 180; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277; *Phoenix Hermetic Co. v. Filtrine Mfg. Co.*, 164 App. Div. 424, 150 N. Y. Supp. 193.

<sup>263</sup> *Miller v. Zander*, 85 Misc. Rep. 499, 147 N. Y. Supp. 479.

<sup>264</sup> *Luckenbach v. Thomas* (Tex. Civ. App.) 166 S. W. 99.

<sup>265</sup> *Raley v. County of Umatilla*, 15 Or. 172, 13 Pac. 890, 3 Am. St. Rep. 142; *Roy v. Harney Peak Tin Mining, Milling & Mfg. Co.*, 21 S. D. 140, 110 N. W. 106, 9 L. R. A. (N. S.) 529, 130 Am. St. Rep. 706; *Davison v. Davison*, 71 N. H. 180, 51 Atl. 905; *Elder v. Sablin*, 66 Ill. 128. Breach of promissory representations as constituting fraud, see, *supra*, §§ 89 et seq.

<sup>266</sup> *Trenkmann v. Schneider*, 26 Misc. Rep. 695, 56 N. Y. Supp. 770.

company which was the owner of much real estate in a town, and largely engaged in building, sold a house and lot to a house painter, agreeing to give him the painting for the company so long as his work was satisfactory, he may rescind on showing that no such work was given to him, although he was ready and able to perform it and was willing to do so for a reasonable compensation.<sup>267</sup> Again, where it is a part of the consideration for the purchase of stock in a corporation that the purchaser, as soon as qualified, shall be appointed treasurer and business manager of the company, and this agreement is not fulfilled, it is cause for rescission on his part.<sup>268</sup> This rule is also applicable where the stock is purchased on the express agreement that those who formerly controlled the company shall not be connected with it after its reorganization,<sup>269</sup> and where stock is delivered to an officer of the corporation under an agreement that it shall be transferred by him to a certain capitalist to induce him to give the corporation financial and other assistance.<sup>270</sup> Again, where the consideration of a contract includes an agreement on the part of one of the parties to make loans or advances to the other, to pay his debts, or to furnish him money for living expenses, and performance of such agreement is refused, a case for rescission arises.<sup>271</sup> And rescission was decreed in a case where one conveyed a farm to another for a nominal consideration, and the grantee un-

<sup>267</sup> *Westview Sav. Bank & Building Co. v. Zook*, 16 Ky. Law Rep. 158.

<sup>268</sup> *Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420; *Seymour v. Detroit Copper & Brass Rolling Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186. And see *American Union Life Ins. Co. v. Wood* (Tex. Civ. App.) 57 S. W. 685. But it is held that the act of part of the promoters of a corporation in promising a subscriber for stock that he should be manager of the company when formed does not amount to a misrepresentation or fraud, avoiding the written subscription not containing such condition, where the promoters were not authorized by any one to make such promises. *Collins v. Southern Brick Co.*, 92 Ark. 504, 123 S. W. 652, 135 Am. St. Rep. 197, 19 Ann. Cas. 882.

<sup>269</sup> *Meinershagen v. Taylor*, 169 Mo. App. 12, 154 S. W. 886.

<sup>270</sup> *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931.

<sup>271</sup> *Key v. National Life Ins. Co.*, 107 Iowa, 446, 78 N. W. 68; *Dorthy v. Strauchen*, 20 App. Div. 89, 46 N. Y. Supp. 951; *Norgren v. Jordan*, 46 Wash. 437, 90 Pac. 597.

dertook to cultivate the farm and to deliver to the grantor a portion of the produce, which he failed to do.<sup>272</sup> And under an agreement to supply a certain commodity under conditions restricting the buyer from selling again, the seller may refuse to supply him after his breach of the condition.<sup>273</sup>

But if the promissory undertaking, in the nature of a condition subsequent, does not go to the whole consideration of the contract, but affects only a subordinate or incidental part of it, so that its breach can be compensated in damages, such breach will not give cause for rescission. Thus, in a case in Missouri, the complainant conveyed to the defendant railroad company certain property on which the company was wrongfully maintaining a switch, releasing his right to damages in consideration of the payment of a specific sum, and the contract further provided that the defendant should not use the switch to stand cars on, but should keep it open and free from cars except when in actual use. And it was held that the railroad's breach of this latter requirement was not a failure to perform the whole consideration, and that the complainant could not maintain a suit to cancel the contract and the deed on that ground, but was limited to a suit for damages.<sup>274</sup> In another case, a gas company contracted with a brick manufacturing company to furnish the latter with free gas for a certain period and with gas at a reduced price for an additional period. The condition was that the brick company should construct a plant at a designated place, of such extent and capacity that it would regularly and permanently employ not less than 25 persons, and if, at any time, the plant should be found operating with less than that number of hands, the gas company might charge three cents per thousand cubic feet of gas, and should not be held to furnish the gas free until the brick company should have at least the full number of employes on its pay roll. The brick

<sup>272</sup> *Leach v. Leach*, 4 Ind. 628, 58 Am. Dec. 642.

<sup>273</sup> *New York Ice Co. v. Parker*, 21 N. Y. Super. Ct. 688.

<sup>274</sup> *Haydon v. St. Louis & S. F. R. Co.*, 222 Mo. 126, 121 S. W. 15, affirming 117 Mo. App. 76, 93 S. W. 833. And see *Cheney v. Bierkamp*, 58 Colo. 319, 145 Pac. 691.

company did not at all times employ the full number of hands required by the contract. But it was held that this did not justify the gas company in rescinding the contract entirely, but merely gave it the right, upon the happening of that contingency, to charge and collect for the gas supplied at the price named.<sup>275</sup> And so, where an owner of property is induced to grant a lease of it to another by the latter's assurance that he intends to use the premises for a certain purpose, though in fact the lessee means to use them for an entirely different purpose, and does so use them, this is not such a fraud or breach of condition as will justify relief in equity.<sup>276</sup>

Much conflict of opinion has arisen in cases where a contract for the sale of land includes an agreement, on the part either of the vendor or vendee, to erect buildings on it, make other improvements, or devote the premises to a specified use. The rule appears to be that if a covenant of this kind affects the entire consideration of the contract, insomuch that the contract would not have been accepted if the covenant had been omitted, then the breach of it will give ground for rescission. Thus, in a case in Colorado, the plaintiff conveyed unplatted land worth at least \$6,000, to defendant, an improvement company, for \$100, and took a bond in the penal sum of \$500 only, conditioned to be void if the defendant should survey, grade, and improve the streets on said land, make other valuable improvements thereon, and begin within thirty days to plat and divide the land into lots and deed to the plaintiff one-tenth of the lots, to be divided by alternate drawing. The evidence showed that the improvements contemplated were a system of waterworks and a hotel to cost \$75,000. It was held that the consideration of the deed to the defendant was the expenditure of money in improving the land, and that, upon the defendant's failure to make the improvements, the plaintiff was entitled to rescind.<sup>277</sup> But this principle has

<sup>275</sup> *Minnetonka Oil Co. v. Cleveland Vitrified Brick Co.*, 27 Okl. 180, 111 Pac. 326.

<sup>276</sup> *Feret v. Hill*, 15 O. B. 207.

<sup>277</sup> *Boyes v. Green Mountain Falls Town & Imp. Co.*, 3 Colo. App. 295, 33 Pac. 77. And see *Emery v. De Goller*, 117 Pa. 153, 12 Atl. 152. And see, *supra*, § 91.

been often controverted. In one of the cases to the contrary it appeared that a deed granted a right of way to a railroad company, in consideration of the enhanced value to the grantor's other land in consequence of the construction of the road and the location of a station on the land granted, but it did not provide for a reversion on the non-performance of the conditions by the company. It was held that the deed vested the title in the company, even though it failed to locate or maintain the station as agreed, and the grantor's remedy was by action for the breach of the contract, rather than for the cancellation of the deed.<sup>278</sup> A similar difference of opinion is found in the case where the vendor of land (suburban property, for instance) agrees as part of his contract to make improvements upon the land sold or upon the tract of which it constitutes a part, such as grading, opening streets, making connections for gas and water, or the like. Several of the cases maintain that the breach of these conditions will warrant a rescission by the vendee.<sup>279</sup> But there is also authority to the contrary.<sup>280</sup> At any rate, it seems that there must be a complete failure to keep all the covenants or conditions of the contract, and that the breach of one out of several such conditions will not give cause for rescission. Thus, in a case in New York, the grantor of lots covenanted to lay sidewalks of cement, and water and gas mains, and to plant shade trees, and to macadamize the street, and performed all that he had promised, except as to macadamizing the street, and it was held that the grantee could not rescind

<sup>278</sup> *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39. And see *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Troxler v. New Era Bldg. Co.*, 137 N. C. 51, 49 S. E. 58; *Buckner v. Pacific & G. E. Ry. Co.*, 53 Ark. 16, 13 S. W. 332.

<sup>279</sup> *Laser v. Forbes*, 105 Ark. 166, 150 S. W. 691; *Tennant Land Co. v. Nordeman*, 148 Ky. 361, 146 S. W. 756.

<sup>280</sup> *Powell v. Berry*, 91 Va. 568, 22 S. E. 365. Under a contract of sale of a lot in which the vendor stipulates to build granolithic walks, the purchaser, two years thereafter, may not rescind because the walks have not been built, where the lot sold was only one of many comprising a single enterprise, and the stipulation manifestly referred to the whole enterprise. *Dowling v. Miller-Kendig Real Estate Co.* (Sup.) 115 N. Y. Supp. 154.



for this cause alone.<sup>281</sup> Moreover, some of the decisions take the position that, if a provision of this kind inserted in a deed is a condition, the breach of it will cause a forfeiture of the estate, and a court of law would adjudge a forfeiture on the same evidence or even less evidence than would be required in a court of equity to cancel the deed, if the case were a proper one for that remedy, and hence, for these reasons, the remedy at law is adequate and a suit for cancellation of the deed should not be maintained.<sup>282</sup>

**§ 214. Non-Payment of Consideration.**—Failure of one of the parties to a contract to make the stipulated payments to the other may constitute such a breach of condition as will justify the abandonment or rescission of the contract. Thus, in one of the cases, the plaintiff and another were engaged in building for a canal company an extension of its canal, and a sum of \$20,000 which was due to them under the contract remained unpaid. They notified the company that they considered the contract annulled in consequence of the failure to make the payment, but added that, to enable the company to make other arrangements, they would continue the work for six days longer, for which they would ask no pay, except what the company might feel bound to allow them. At the end of the six days, having received no answer from the company, they withdrew their previous note, except that part of it declaring the contract annulled. And it was held that they were justified in abandoning the contract when they did, and were entitled to a fair compensation for the work performed.<sup>283</sup> So, where a contractor who has undertaken to do the grading of a railroad has given bond for the faithful performance of his contract, and the other parties to the contract withhold any part of the compensation which is due and payable, though it be for the purpose of paying the hands

<sup>281</sup> *Duff v. Queensboro Heights Land Corporation*, 79 Misc. Rep. 546, 140 N. Y. Supp. 254.

<sup>282</sup> *Monnett v. Columbus, S. & H. Ry. Co.*, 26 Ohio Cir. Ct. R. 469; *Piedmont Land Improvement Co. v. Piedmont Foundry & Machine Co.*, 96 Ala. 389, 11 South. 332.

<sup>283</sup> *South Fork Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894. See *Cannon v. Turner-Hudnut Co.*, 185 Ill. App. 9.

or subcontractors, the contractor has a right to abandon the work and recover compensation in damages.<sup>284</sup> And on the same principle, where theatrical managers undertake to produce an author's play, and the latter is given the right, under the contract, to terminate it on their failure to pay his royalties as provided therein, he may put an end to the contract although the other parties had arranged with their agent to remit the royalties which the agent neglected to do.<sup>285</sup> And upon a stipulation by the seller to send to the purchaser ten sewing machines each day, and an agreement of the purchaser to sell the same for cash and to remit a certain part of the proceeds to the seller, it is held that his failure to remit will release the seller from the obligation to continue sending the machines.<sup>286</sup> So again, a contract may be rescinded for fraud where a payment thereunder, which by its express terms was not to be made in a certain depreciated and worthless currency, was made by giving a check on a bank, which the bank was not obliged to pay in any other medium than such worthless currency, because the drawer had only that kind of money on deposit.<sup>287</sup> The case of rescission of a contract of sale, whether of personal property or real property, for non-payment of the purchase money, is governed by special rules, which will be considered in another connection.<sup>288</sup>

**§ 215. Payment or Delivery in Installments.**—When a contract provides for the sale or the supplying of certain quantities of a given commodity, deliveries to be made in installments, and the price to be paid in corresponding installments, either at fixed periods (as, weekly, on a certain day of each month, or the like) or upon the delivery and receipt of each installment of the goods, many of the decisions sustain the rather severe rule that default of the purchaser in the payment of any one installment of the price, not justified by the circumstances nor waived by the seller,

<sup>284</sup> *Dobbins v. Higgins*, 78 Ill. 440.

<sup>285</sup> *Weber v. Mapes*, 98 App. Div. 165, 90 N. Y. Supp. 225.

<sup>286</sup> *Stewart v. Many*, 7 Ill. App. 508.

<sup>287</sup> *Scott v. Johnson*, 5 Helsk. (Tenn.) 614.

<sup>288</sup> As to sales of personal property, see, *infra*, § 411; as to sales of real estate, see, *infra*, § 439.

will warrant the latter in rescinding the unexecuted portion of the contract, in refusing to make any further deliveries, and in suing for the value of what has been delivered.<sup>289</sup> For example, where a contract was made for the sale and purchase of a crop of peaches on the trees, to be delivered from day to day, and it was agreed that payment should be made at the end of each week, and the purchaser neglected at the end of one week to make the payment, it was held that the seller had a right to consider the contract as at an end, and that an offer on the part of the vendee two days afterwards to pay the sum due was too late.<sup>290</sup> And indeed, it has been held, under the express provisions of a contract for the sale of coal to be delivered at different times, that a delay of one day in mailing a check for a shipment entitled the seller to refuse further deliveries.<sup>291</sup> So, where a judgment creditor receives notes for a part of his debt and agrees that, if all the notes are paid as they respectively fall due, he will acknowledge satisfaction of the judgment, but if either of the notes should not be paid at maturity, the sums which had been received should be credited on the judgment, he may treat the agreement as rescinded, and proceed to enforce payment of the original indebtedness, when any note is not paid at maturity.<sup>292</sup> This rule is ap-

<sup>289</sup> *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, 51 C. C. A. 213; *Youghiogheny & O. Coal Co. v. Verstine* (C. C.) 176 Fed. 972; *Stokes v. Baars*, 18 Fla. 656; *W. H. Purcell Co. v. Sage*, 200 Ill. 342, 65 N. E. 723; *George H. Hess Co. v. Dawson*, 149 Ill. 138, 36 N. E. 557; *Burt v. Garden City Sand Co.*, 141 Ill. App. 603; *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; *City of Baltimore v. Schaub Bros.*, 96 Md. 534, 54 Atl. 106; *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 66 N. E. 419; *Jenness v. Shaw*, 35 Mich. 20; *Peet v. City of East Grand Forks*, 101 Minn. 518, 112 N. W. 1003; *Strother v. McMullen Lumber Co.*, 200 Mo. 647, 98 S. W. 34; *Bean v. Miller*, 69 Mo. 384; *Price v. City of New York*, 104 App. Div. 198, 93 N. Y. Supp. 967; *New Publication Co. v. Stern* (Sup.) 127 N. Y. Supp. 393; *Bright v. Dean*, 2 City Ct. R. 433, 2 N. Y. Supp. 658; *Rugg v. Moore*, 110 Pa. 236, 1 Atl. 320; *Eastern Arkansas Hedge-Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

<sup>290</sup> *Reybold v. Voorhees*, 30 Pa. 116.

<sup>291</sup> *Southern Coal & Coke Co. v. Bowling Green Coal Co.*, 161 Ky. 477, 170 S. W. 1185.

<sup>292</sup> *Haggerty v. Simpson*, 1 E. D. Smith (N. Y.) 67.

plicable to contracts for the purchase of land. Where such a contract makes the consideration payable in installments, and the purchaser defaults in the payment of the first or any subsequent installment, without any legally sufficient excuse, and without a tender of the amount due, the vendor may at once declare a forfeiture or sue for the rescission of the contract.<sup>293</sup> This, however, is on the supposition that the contract itself does not provide what shall be done in case of such default. If it does, it will control and its provisions must be followed.<sup>294</sup> But in the common case where the contract provides that, in case of default in the payment of any installment, the agreement shall be null and void, and the rights of the purchaser thereunder shall be forfeited, this provision is held to be for the exclusive benefit of the vendor, and he is not bound to terminate the contract on the vendee's default. He has the option to do so, but he may, if he chooses, elect to treat the contract as continuing and insist on performance according to its terms.<sup>295</sup> The same rule is also applicable in the case of building contracts. Unless there are some special provisions in the contract, a contractor for the erection of a building has generally the right to rescind for the owner's failure to pay any installment of the contract price at the time it is due.<sup>296</sup>

But there are also numerous authorities to the contrary of the general rule above stated. These cases hold that, when the seller agrees to deliver goods in installments, and the buyer agrees to pay proportionate parts of the price on the delivery of each installment of the goods, the mere default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract.<sup>297</sup> The theory of these decisions is that noth-

<sup>293</sup> *Davidson v. Keep*, 61 Iowa, 218, 16 N. W. 101; *Thompson v. Kilcrease*, 14 La. Ann. 340; *Gonsoulin v. Adams*, 28 La. Ann. 598; *Pell v. Chandos* (Tex. Civ. App.) 27 S. W. 48; *Reard v. Ephrata Orchard Homes Co.*, 78 Wash. 180, 138 Pac. 678.

<sup>294</sup> *Davis v. Hall*, 52 Md. 673.

<sup>295</sup> *Morris v. Green*, 62 App. Div. 460, 70 N. Y. Supp. 1096; *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347; *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982.

<sup>296</sup> *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951; *Harton v. Hildebrand*, 230 Pa. 335, 79 Atl. 571.

<sup>297</sup> *Rock Island Sash & Door Works v. Moore & Handley Hard-*

ing short of a complete repudiation of the contract by the party in default will justify the other in rescinding it or abandoning further performance; that the effect of an omission to pay an installment of the money due depends on the circumstances of the particular case, and the court must determine from an examination of the conduct of the buyer whether it amounts to an absolute refusal to perform his contract; that a mere failure to pay an installment does not necessarily evince a purpose to renounce the contract; but that a refusal to accept any more of the goods, a direction not to ship any more, or a refusal to pay an installment, will warrant a rescission by the seller if so expressed or if accompanied by such other circumstances as plainly reveal the buyer's purpose to renounce the contract or not to perform it any further on his own part.<sup>298</sup> Further, there can be no rescission for failure to pay an installment of the price when the circumstances justify the buyer in withholding payment, as, where it is alleged that the articles delivered under the contract were deficient in quantity and inferior in quality, and there was insufficient time to count and inspect them.<sup>299</sup> But it is not a sufficient excuse for withholding payment that the other party has been slow and dilatory in performing his part of the agreement, the delay not amounting to an actual breach of the contract.<sup>300</sup>

ware Co., 147 Ala. 581, 41 South. 806; *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724, 1006; *Hansen v. Consumers' Steam Heating Co.*, 73 Iowa, 77, 34 N. W. 495; *Osgood v. Bauder*, 75 Iowa, 550, 39 N. W. 887, 1 L. R. A. 655; *Iowa Brick Mfg. Co. v. Herrick*, 126 Iowa, 721, 102 N. W. 787; *Collins v. Swan-Day Lumber Co.*, 158 Ky. 231, 164 S. W. 813; *Gerli v. Poldebard Silk Mfg. Co.*, 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; *Blackburn v. Reilly*, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159; *Empire Rubber Mfg. Co. v. Morris*, 77 N. J. Law, 498, 72 Atl. 1009.

<sup>298</sup> *Monarch Cycle Mfg. Co. v. Royer Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523; *Johnson Forge Co. v. Leonard*, 3 Pennewill (Del.) 342, 51 Atl. 305, 57 L. R. A. 225, 94 Am. St. Rep. 86; *Quarton v. American Law Book Co.*, 143 Iowa, 517, 121 N. W. 1009, 32 L. R. A. (N. S.) 1; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791; *Casey v. Gunn*, 29 Mo. App. 14; *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

<sup>299</sup> *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *Hime v. Klasey*, 9 Ill. App. 190.

<sup>300</sup> *American-Hawaiian Engineering & Construction Co. v. Butler*, 165 Cal. 497, 133 Pac. 280.

And even if good ground for terminating the contract exists, the purchaser's failure to pay an installment when due does not automatically produce that result, but it is necessary, to effect a rescission, that the seller should exercise his election to rescind.<sup>801</sup> And even in this he may be restricted by the terms of the contract. Thus, where a contract for the construction of a pavement provided for payment in installments, the last to be paid when the work was completed, and also required the contractor to repair and keep the pavement in order for ten years, it was held that the failure of the promisor to make the last payment did not excuse or release the contractor from his undertaking to maintain the pavement, but only gave him an immediate right of action for the balance.<sup>802</sup>

A cause of rescission or forfeiture, arising out of the purchaser's failure to pay an installment, may be waived by the vendor. But mere indulgence in a delay, or the acceptance of one installment of the price after it becomes due, does not, as a matter of law, waive prompt payment of subsequent installments, where no element of estoppel is involved.<sup>803</sup> But acquiescence in repeated delays in making payments may have this effect, and it is generally held that a waiver may be claimed where the course of dealings between the parties shows that the seller did not intend to insist on prompt payments or to claim the advantages which a delay in payments might give him.<sup>804</sup> And in a case where the purchaser of a lot made default in the payment of a monthly installment, and the vendor then wrote to him, saying: "Pay when you can, and it will be all right," it

<sup>801</sup> *Farmers' Cotton Oil & Trading Co. v. W. L. Ward & Son*, 170 Ala. 491, 54 South. 513.

<sup>802</sup> *Nelson v. San Antonio Traction Co.* (Tex. Civ. App.) 142 S. W. 146.

<sup>803</sup> *Long v. Clark*, 90 Kan. 535, 135 Pac. 673; *True v. Northern Pac. Ry. Co.*, 126 Minn. 72, 147 N. W. 948; *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574, 11 Ann. Cas. 1045. But see *Little Rock Cooperage Co. v. L. N. Lanier & Co.*, 83 Ark. 548, 104 S. W. 221.

<sup>804</sup> *Fairchild-Gilmore-Wilton Co. v. Southern Refining Co.*, 158 Cal. 264, 110 Pac. 951; *Tetley v. McElmurry*, 201 Mo. 382, 100 S. W. 37; *Edward Thompson Co. v. Vacheron*, 69 Misc. Rep. 83, 125 N. Y. Supp. 939.

was held that this was an unconditional waiver of the vendor's right to claim a forfeiture under the contract, and that he could not thereafter exercise such right until he had revoked his waiver by fixing some definite date at which the purchaser would be required to pay.<sup>305</sup>

Similar rules obtain in the case where a rescission is claimed by the vendee. That is to say, where one who has contracted to sell or to supply given articles in installments fails to make punctual delivery of the first or any subsequent installment, the purchaser may rescind the contract, and refuse to accept or be bound for any further deliveries, if he gives prompt and plain notice of his intention to terminate the contract.<sup>306</sup> And he has the same right where a delivery is insufficient in quantity or inferior in quality, as measured by the requirements of the contract; and in this case, the election to rescind having been exercised and due notice thereof given to the seller, the latter cannot reinstate himself and insist on completing the contract by afterwards making up the required quantity or replacing the inferior articles, or offering to do so.<sup>307</sup> In a case in Maryland, the evidence showed that one Burt, a manufacturer of iron, agreed to supply to Bollman, a consumer, two hundred tons of pig iron of a specified quality, at a stipulated price, "to be delivered in quantities of about 18 tons per month," which Bollman agreed to take and pay for. Two small consignments of iron were delivered about two months after the signing of the contract, but no further deliveries were made. About two months later, Bollman wrote to Burt that he considered the contract at an end. The court said: "We do not hold that a mere failure or omission by Burt to deliver one installment of the iron would, standing alone, have authorized Bollman to declare

<sup>305</sup> *Gray v. Gurley*, 252 Mo. 410, 159 S. W. 1076.

<sup>306</sup> *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Norrington v. Wright* (C. C.) 5 Fed. 768 (affirmed, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366); *Gerll v. Poldebard Silk Mfg. Co.*, 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; *Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.*, 112 Md. 437, 77 Atl. 56. But see *Hanes v. Kentucky Distillery Co.*, 6 Ky. Law Rep. 451.

<sup>307</sup> *Elting Woolen Co. v. Martin*, 5 Daly (N. Y.) 417; *Moses Lobe & Co. v. Abraham Reinach & Co.*, 2 McGloin (La.) 170.



the contract at an end, although under some circumstances such might be the case. But we think that repeated failures to make any delivery would defeat the purposes and objects of the contract, and that an action at law would not give an adequate compensation for such breaches."<sup>308</sup> In such cases as these, an acceptance of an installment after the proper time for its delivery, or which is insufficient in quantity, is not necessarily a waiver of the right to insist on strict performance of the contract, and does not prevent a rescission of the contract in case of failure thereafter to perform in accordance with its terms.<sup>309</sup> But where deliveries repeatedly fall short of the required amount, but are nevertheless accepted, and this course is acquiesced in by both parties, its effect is a mere postponement, and not an abandonment, of performance as to the balance, and the buyer is bound to accept the seller's offer of the residue at the rate of delivery agreed on.<sup>310</sup>

**§ 216. Failure of Punctual Performance; Time of the Essence.**—Any condition or stipulation in a contract which is mutually understood and agreed by the parties to be of such vital importance that a sufficient performance of the contract cannot be had without exact compliance with it is said to be "of the essence" of the contract. And time is of the essence of a contract when the intention of the parties was that a punctual performance, at the precise time named, should be vital to the agreement and one of its essential elements. Where time is of the essence of a contract, and one of the parties fails to perform his part of the agreement punctually, at or within the appointed time, the other party, not being himself in default, will thereupon have the right to rescind the contract and treat it as at an end,<sup>311</sup> which

<sup>308</sup> *Bollman v. Burt* (Md. 1884) 17 Reporter, 749.

<sup>309</sup> *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Wolfert v. Caledonia Springs Ice Co.*, 195 N. Y. 118, 88 N. E. 24, 21 L. R. A. (N. S.) 864.

<sup>310</sup> *Haines v. Tucker*, 50 N. H. 307.

<sup>311</sup> *Selbel v. Purchase* (C. C.) 134 Fed. 484; *Freeman v. Griswold*, 4 Cal. Unrep. 256, 34 Pac. 327; *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S. E. 402; *Ashford v. Meyer* (Iowa) 125 N. W. 194; *Frommel v. Foss*, 102 Me. 176, 66 Atl. 382; *Sullivan v. Boswell*, 122 Md. 539, 89 Atl. 940; *Truesdail v. Ward*, 24 Mich. 117;

right will be recognized and enforced by the courts, unless the circumstances of the particular case show that it would be grossly inequitable to do so.<sup>312</sup> Thus, where land is sold under a contract making time of the essence, and calling for payment by installments under penalty of forfeiture for non-payment, and every installment has been paid except the last, which is not paid at the time fixed, the vendor may declare a forfeiture, unless he has agreed to perform some act necessary to complete his contract, such as giving an abstract of title or tendering a deed, in which case his right to forfeit depends on his offer and ability to perform, his duty to tender performance being in that case concurrent with the duty of the purchaser to make the final payment.<sup>313</sup>

A clause making the time of performance essential may be inserted in the contract, and this is a proper precaution, if such is the intention of the parties. But the fact that time is regarded as of the essence may also be a proper inference from the circumstances of the case, although it is not so expressed. This was ruled, for instance, in a case where a contractor had undertaken to deliver iron pipe to a city for its use, under a penalty for each day's delay, and he gave a written order for such pipe to a manufacturer, which was accepted the same day. The time of delivery was left blank, but the understanding of the parties was that the contractor was to telegraph the date the next day, which he did, fixing the delivery "within nine weeks from date," and the order was then entered by the manufacturer. Great delay was experienced in securing deliveries of the pipe, and finally, after the expiration of the period so fixed, the contractor rescinded the contract as to all pipe not then delivered. It was held that he was within his rights in so doing, as time was of the essence of the manufacturer's contract.<sup>314</sup> In a somewhat similar case, the plaintiff had con-

*Frost-Trigg Lumber Co. v. Forrester*, 124 Mo. App. 304, 101 S. W. 164; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096. *Contra*, *Attorney General v. Purmort*, 5 Paige (N. Y.) 620.

<sup>312</sup> *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598.

<sup>313</sup> *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N. S.) 956.

<sup>314</sup> *Camden Iron Works v. Fox* (C. C.) 34 Fed. 200.

tracted with the sanitary district of the city of Chicago to excavate for the district a portion of the drainage canal, and the contract provided for a forfeiture by the district in case the plaintiff should be in default in the progress or character of the work, and it was held that the forfeiture would be enforced, since the inconvenience to the public resulting from a failure to have the canal excavated could not be measured in money.<sup>315</sup> And even if the contract contains no provision making time of the essence, it may be made so, unless this is forbidden by statute,<sup>316</sup> by a subsequent demand for performance fixing a definite date for it, and declaring an intention to rescind or declare a forfeiture on failure at that time. In a case in New York, a letter from the vendor of real property to the vendee, written after the time fixed for closing the title, to the effect that he must make an additional payment, otherwise the vendor would offer the property for sale, was held insufficient to constitute notice of the time and place of closing the title, so as to make time of the essence and put the vendee in default, but only because it fixed no definite time either for closing the title or for paying the additional sum.<sup>317</sup>

Where the question concerns the payment of the last installment of the purchase price of realty, as we have already stated, it is generally held that the vendor should put the vendee in default by the tender of a deed and a demand for payment. And if the vendor is then dead, it is said that a deed should be made and tendered by his widow and heirs, and if payment is not made, the heirs may declare a forfeiture.<sup>318</sup>

It is said that in mining contracts, involving the sale or lease of mines or oil or gas territory, time is always more or less of the essence of the contract. Thus, a contract to convey mining claims on the payment of part of the price

<sup>315</sup> *Harley v. Sanitary District of Chicago*, 226 Ill. 213, 80 N. E. 771.

<sup>316</sup> See, for instance, Rev. Codes Mont. § 5047, providing that time shall not be of the essence of a contract unless expressly so provided. See *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700.

<sup>317</sup> *Foland v. Italian Savings Bank*, 123 App. Div. 598, 108 N. Y. Supp. 57. And see *Auxler v. Taylor*, 102 Iowa, 673, 72 N. W. 291.

<sup>318</sup> *Peck v. Brighton Co.*, 69 Ill. 200.

in cash, and the balance in installments on two specified dates, makes time of the essence, and the failure of the purchaser to pay the balance due on the dates fixed relieves the owner of any obligation to convey.<sup>819</sup> So, a petition alleging that the defendant contracted to complete an oil well within one year, and that at the time of beginning the suit, four years after the making of the contract, he had made no preparations for commencing the well, sets forth a cause of action for rescission of the contract.<sup>820</sup>

**§ 217. Same; Failure to Deliver or Perform at Time Stipulated.**—Some of the cases show a disposition to hold that time must be considered as of the essence of the contract whenever the instrument itself fixes an exact date for the completion of the work, the delivery of the article, or the payment of the consideration, so that, on failure of punctual performance by one party, the other will be released from the obligation of the contract.<sup>821</sup> This rule has been applied, for instance, in the case of building contracts. Where such a contract provides that materials shall be furnished and labor performed for a gross sum, and the contract completed by a specified day, the owner may insist on a strict performance, and put an end to the contract for failure to complete by the day appointed; and though the contract provides that, on the contractor's default, the owner may terminate the contract and enter and complete the work, at the contractor's expense, this provision will not preclude the owner from cancelling the contract for a substantial failure of the contractor to perform.<sup>822</sup> So also it is said that, with merchants, the time of shipment, when particularly provided for in the contract, is a warranty or a condition precedent, upon the breach of which the ag-

<sup>819</sup> *Harper v. Independence Development Co.*, 13 Ariz. 176, 108 Pac. 701.

<sup>820</sup> *Murray v. Barnhart*, 117 La. 1023, 42 South. 489.

<sup>821</sup> *Stewart v. Allen* (C. C.) 47 Fed. 399; *Richard Deeves & Son v. Manhattan Life Ins. Co.*, 195 N. Y. 324, 88 N. E. 395; *Kallis v. Lissberger*, 39 Misc. Rep. 773, 81 N. Y. Supp. 332; *Miller v. Sullivan*, 14 Tex. Civ. App. 112, 33 S. W. 695, 35 S. W. 1084, 37 S. W. 778.

<sup>822</sup> *Fraenkel v. Friedmann*, 199 N. Y. 351, 92 N. E. 666; *General Supply & Construction Co. v. Goelet*, 149 App. Div. 80, 133 N. Y. Supp. 978; *Hay v. Bush*, 110 La. 575, 34 South. 602.

grieved party may terminate the entire contract.<sup>823</sup> But the general rule is that, although the agreement may specify a day for performance or payment, yet if it is not expressly declared to be of the essence of the contract, or is not consistently so treated by the parties, mere delay or failure to pay or perform on the appointed day will not be sufficient ground for the rescission of the contract.<sup>824</sup> Thus, a vendee in a contract for the sale of real estate will not be entitled to rescind the contract for failure of the vendor to deposit a deed in escrow within the time stipulated in the agreement of sale, unless the stipulation to do so was made a condition precedent on which the obligation to purchase and pay the remainder of the price depended.<sup>825</sup> It is true that courts of equity do not encourage laches or slothfulness; but on the other hand, equity is not fond of taking advantage of forfeitures arising merely from a lapse of the time specified; on the contrary, it is the constant course to relieve against such forfeitures where adequate compensation can be made.<sup>826</sup> Hence, for example, a vendor of land who has received a large part of the purchase money should not be permitted to rescind the contract and recover the land, if the purchaser is ready, able, and willing to pay the balance due, no matter how long he has been in default,<sup>827</sup> nor in any case where the evidence shows that time has not

<sup>823</sup> *Clauss Shear Co. v. Alabama Barber Supply Co.*, 1 Ala. App. 664, 56 South. 49; *Heidelbaugh v. Cranston*, 4 Pennewill (Del.) 464, 56 Atl. 367.

<sup>824</sup> *Moore v. Belseker*, 147 Fed. 367, 77 C. C. A. 545; *McAllister-Coman Co. v. Matthews*, 167 Ala. 361, 52 South. 416, 140 Am. St. Rep. 43; *American Type-Founders' Co. v. Packer*, 130 Cal. 459, 62 Pac. 744; *Burkhalter v. Roach*, 142 Ga. 344, 82 S. E. 1059; *Clark v. Lyons*, 25 Ill. 105; *Reid, Murdoch & Co. v. Somerset Canning Co.*, 182 Ill. App. 112; *Linscott v. Buck*, 33 Me. 530; *McTague v. Sea Isle City Lot & Building Ass'n*, 57 N. J. Law, 427, 31 Atl. 727; *Field v. Holbrook*, 14 How. Prac. (N. Y.) 103; *Gale v. Nixon*, 6 Cow. (N. Y.) 445; *Scott v. Smith*, 58 Or. 591, 115 Pac. 969; *Hild v. Linne*, 45 Tex. 476; *Lochausen v. Laughter*, 4 Tex. Civ. App. 291, 23 S. W. 513; *Selden v. Camp*, 95 Va. 527, 28 S. E. 877; *Campbell v. Alsop's Adm'r*, 116 Va. 39, 81 S. E. 31.

<sup>825</sup> *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796.

<sup>826</sup> *Nelson v. Carrington*, 4 Munf. (Va.) 332, 6 Am. Dec. 519; *Abbott v. L'Hommedieu*, 10 W. Va. 677.

<sup>827</sup> *Wiseman v. Cottingham* (Tex. Civ. App.) 141 S. W. 817.

been treated by the vendor as of the essence of the contract in respect to the defaults relied on for the forfeiture.<sup>328</sup> And equity will not enforce a forfeiture of the privileges of the grantees in a contract, for failure to complete their performance of it in time, where the party seeking the forfeiture was guilty of the first breach, and failed to pay installments due until compelled to do so by judgments, while the grantees were vigorously prosecuting their part of the work, which they had, within the time limited, substantially performed, although they had not completely finished it.<sup>329</sup>

In any event, and on the strictest view of the rights of the parties, where time is not of the essence of a contract, the failure of the contractor to complete the work within the time specified does not ipso facto dissolve or terminate the contract, but at most it gives the other party an election to rescind,<sup>330</sup> and the contract continues in force, giving the first party an opportunity to complete his performance of it, until the second party exercises his option to rescind and gives distinct notice of it.<sup>331</sup>

**§ 218. Same; Unreasonable Delay in Delivery or Performance.**—Notwithstanding what was said in the preceding section concerning the reluctance of courts of equity to enforce forfeitures for mere delay in performance where time is not of the essence of the contract, it must not be supposed that these tribunals will grant unlimited indulgence, or that a party who is in default can be permitted, at any indefinite time, to claim his rights under the contract and insist on completing it, without regard to the length of his delay or the inconvenience or loss it may have occasioned. On the contrary, one seeking to rescind a mutual contract, of which time is not the essence, on the ground of delay by the other party in complying with its terms, may have

<sup>328</sup> Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088.

<sup>329</sup> Pike's Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 333.

<sup>330</sup> Brady v. Oliver, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 376; Murray v. Barnhart, 117 La. 1023, 42 South. 489; Arbuthnot v. Big Pine Lumber Co., 134 La. 529, 64 South. 401.

<sup>331</sup> Beck v. Chambers, 18 N. M. 53, 133 Pac. 972.

the relief he seeks if he is able to show either such willful and intentional delay as will evince the intention of the defaulting party to treat the contract as at an end, or that the delay has caused him such loss or damage as would render a decree of specific performance inequitable and unjust.<sup>332</sup>

This rule applies to contracts for the purchase and sale of land. In these cases, a rescission has been decreed or sustained on account of mere delay, though time was not of the essence of the contract, where the purchaser neglected to pay the price or the vendor neglected to tender a conveyance, and the delay had continued for a period of anywhere from four to ten years.<sup>333</sup> And in one instance, where the contract required the purchaser to make a second payment within four days after the first, and he neglected to do so for several months, it was considered that the vendor was then justified in selling the property to a third person and putting him in possession.<sup>334</sup> But on the other hand, one cannot rescind a contract for the purchase of land merely because the vendor has been unable, in consequence of the refusal of a tenant to vacate, to deliver possession until seven or eight days after the time stipulated, such delay being unimportant and being used merely as an excuse in aid of a desire to rescind.<sup>335</sup> As to the proper course to pursue in cases of this kind, it has been said: "Although there is no stipulation of the parties that time shall be of the essence of the contract, nor anything in the nature or circumstances of the agreement to make it so, yet it may be made essential by the proper action of a party who is not in default and is ready to perform, if the

<sup>332</sup> *Reid v. Mix*, 63 Kan. 745, 66 Pac. 1021, 55 L. R. A. 706; *Parisi v. Guardian Savings & Loan Co.*, 30 Misc. Rep. 743, 62 N. Y. Supp. 1094. Compare *McFarlan Carriage Co. v. Connersville Wagon Co.*, 49 Ind. App. 318, 96 N. E. 400.

<sup>333</sup> *Goetzmann v. Caldwell* (Sup.) 152 N. Y. Supp. 491; *Zimmerman v. Branyan*, 62 N. J. Law, 478, 41 Atl. 689; *Howard v. Babcock*, 7 Ohio, 73, pt. 2; *Tompkins v. Seely*, 29 Barb. (N. Y.) 212; *Ballard v. Walker*, 3 Johns. Cas. (N. Y.) 60; *Barrows v. Harter*, 165 Cal. 45, 130 Pac. 1050. But compare *Tompkins v. Hyatt*, 28 N. Y. 347.

<sup>334</sup> *Drew v. Duncan*, 11 How. Prac. (N. Y.) 279.

<sup>335</sup> *Armstrong v. Breen*, 101 Iowa, 9, 69 N. W. 1125.



other party is in default without justification. Thus if the vendee, without sufficient excuse, fails to pay at the stipulated time, and the vendor is in no default and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time or he (the vendor) will consider and treat the contract as rescinded. In such case, if payment be not made within a reasonable time, the vendor has a right to treat the contract as abandoned by the vendee. In like manner, and with like consequences, the vendee may notify the vendor if the latter is in default and the former is not."<sup>336</sup> So also, in regard to mining contracts and leases. Where land is conveyed to a party on condition that he shall, "at his own convenience and time," and at his own expense, test for minerals, and if any be found worth working, to work the same and pay the grantor a proportion of the net profits, and this was the sole consideration, the grantee is bound to perform the condition within a reasonable time and to carry on the work continuously, and a failure to do either will work a forfeiture.<sup>337</sup>

The same rule has been applied in the case of building contracts. The owner may terminate the contract (or a subcontractor may terminate his part of the engagement) on account of the unreasonable and unexcused delay of the contractor in prosecuting the work,<sup>338</sup> as, for example, where the contractor has undertaken to build and finish a house by a certain date, and at the expiration of the time he has not even commenced the work.<sup>339</sup> In other classes of contracts, the length of the delay, as being justifiable or unreasonable, depends on the circumstances of the particular case and the nature of the work to be performed. Thus, where one contracted to dig a well for another, the work to be pushed as fast as possible, and shortly after beginning the work the drill became fastened in the well and could not be removed, and the contractor made occasional efforts

<sup>336</sup> Kirby v. Harrison, 2 Ohio St. 326, 59 Am. Dec. 677.

<sup>337</sup> Adams v. Ore Knob Copper Co. (C. C.) 7 Fed. 634.

<sup>338</sup> Seventh Street Planing Mill Co. v. Schaefer, 30 Ky. Law Rep. 623, 99 S. W. 341.

<sup>339</sup> Miller v. Phillips, 31 Pa. 218.

to remove it during the next eight months, and then said that he abandoned it and wished to start another well under the same contract, it was held that his unreasonable delay gave the other party a right to rescind.<sup>840</sup> But on the other hand, where a plan for financing a railroad company contemplated the organization of a new company for the purpose of issuing a series of bonds, and the sale of the same by a finance company, which was a party to the contract, and no particular time was limited, it was held that the failure to sell the bonds within sixteen months was no ground for rescinding the contract.<sup>841</sup>

In contracts for the sale of personal property, the tendency is to regard a comparatively short delay as unreasonable, if there are no obstacles to the completion of the contract. Thus, where a contract was for the delivery of a quantity of books, and two years and a half elapsed before the delivery of the first sets, it was held that the delay, if unexplained, was so unreasonable as to constitute a breach of the contract.<sup>842</sup> So, where an order is placed for a cash register, not to be specially made for the customer, but to be furnished out of stock, a delay of more than a month in tendering delivery is sufficient to justify the purchaser in countermanding the order.<sup>843</sup> And where a contract for the sale of a piano, which should ordinarily be completed promptly, is not completed within four months, and neither party has done anything within that time to complete the same, either party may treat the contract as rescinded.<sup>844</sup> Again, on a sale of cotton, which under the custom of the trade should have been received and paid for in from three to five days, where the seller was importunate in his endeavors to close the sale, and the buyer inactive until seven days thereafter, it was held that the seller had the right

<sup>840</sup> *Duple v. Warren* (Iowa) 79 N. W. 363.

<sup>841</sup> *American Loan & Trust Co. v. Toledo, O. & S. Ry. Co.* (C. C.) 47 Fed. 343.

<sup>842</sup> *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451.

<sup>843</sup> *Hallwood Cash Register Co. v. Lufkin*, 179 Mass. 143, 60 N. E. 473.

<sup>844</sup> *Hallet & Dayis Piano Co. v. Starr Piano Co.*, 85 Ohio, 196, 97 N. E. 377.

to rescind the sale on such seventh day.<sup>345</sup> But in all these cases it must be observed that no advantage can be taken of a delay which is adequately explained and for which a sufficient excuse is offered.<sup>346</sup>

§ 219. **Same; Waiver or Extension of Time.** (Even where time is made the essence of the contract, this provision may be waived by the party for whose benefit or protection it is inserted, either expressly or by extending the time for payment or performance or by granting indulgence to the other party in this regard; and when such a waiver has been made, he cannot arbitrarily and summarily declare a forfeiture of the contract for delay, but must first demand payment or performance and give the other party a reasonable time and opportunity, after such demand, to comply.<sup>347</sup> Thus, although a purchaser of land has made default in paying agreed installments of the price, yet if the vendor, by his subsequent course of dealing, has led the purchaser to believe that a forfeiture will not be insisted on, he cannot suddenly declare a forfeiture without giving notice and an opportunity to pay the balance due.<sup>348</sup>) So, where the contract requires the vendors of land to furnish title papers and the purchaser to ascertain the acreage within a given time, and both parties have failed to perform within the stipulated time, the vendor cannot claim a forfeiture of the contract without first tendering performance.<sup>349</sup> In a case in Illinois, the complainants offered to sell certain land to defendant at a stated price if paid within ten days, but on defendant's objection to the time limit, complainants withdrew it and agreed to give time for examination of title, etc., which offer was accepted. Complainants waited fifty days, and then tendered a deed and

<sup>345</sup> *Tabary v. Thieneman*, 27 La. Ann. 720.

<sup>346</sup> *American Case & Register Co. v. Griswold*, 68 Misc. Rep. 379, 125 N. Y. Supp. 4.

<sup>347</sup> *Taylor v. Goelet*, 208 N. Y. 253, 101 N. E. 867, Ann. Cas. 1914D, 284; *Shorett v. Knudsen*, 74 Wash. 448, 133 Pac. 1029; *Gibson v. Rouse*, 81 Wash. 102, 142 Pac. 464; *Bennie v. Becker-Franz Co.*, 14 Ariz. 580, 134 Pac. 280. See *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303, 11 S. W. 18, 957.

<sup>348</sup> *Smith v. Treat*, 234 Ill. 552, 85 N. E. 289.

<sup>349</sup> *Golden v. Cornett*, 154 Ky. 438, 157 S. W. 1076.

demanded the purchase money. Defendant promised to pay it by the next day at noon, whereupon the complainants notified him that the contract would be rescinded unless he paid the money at that time. He failed to do so, and they declared the contract rescinded. It was held that the complainants' acts constituted a proper and effectual rescission of the contract.<sup>350</sup>

Where the time for payment or performance of a contract is extended by agreement, although no consideration is given for the extension, the contract cannot be rescinded for non-performance until the expiration of the extended time.<sup>351</sup> But such an extension of time must be shown to have been granted in clear terms and with explicit reference to the contract in question.<sup>352</sup> And it should be observed that it does not create a new contract, but constitutes only a modification in that one regard of the original contract, so that, in all other respects, including rights of rescission for causes other than delay in performance, the rights of the parties continue to be governed by their original agreement.<sup>353</sup>

§ 220. **Same; Penalty Fixed for Delay.**—When a contract fixes a specific time for performance or for completion of the work, and contains a condition by which a certain sum is to be forfeited, or a per diem penalty imposed, if the contracting party fails to perform or to complete by the day appointed, this is regarded as making time of the essence of the contract, so that, on default of punctual performance or completion, a rescission of the contract will be justified.<sup>354</sup> But covenants of this kind may often work hardship, and they are construed with some strictness.

<sup>350</sup> *Miller v. Rice*, 133 Ill. 315, 24 N. E. 543.

<sup>351</sup> *United States v. Derringer*, 2 Hayw. & H. 72, Fed. Cas. No. 14,950a.

<sup>352</sup> *Peterson v. Rankin*, 161 Iowa, 431, 143 N. W. 418.

<sup>353</sup> *Bacon v. Cobb*, 45 Ill. 47; *Bamberger Bros. v. Burrows*, 145 Iowa, 441, 124 N. W. 333; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450; *Anspach v. Heft*, 57 Pa. 326; *Akeley v. Carpenter*, 87 Vt. 248, 88 Atl. 897.

<sup>354</sup> *Baumann v. Pinckney*, 14 Daly (N. Y.) 241; *Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co.*, 62 W. Va. 288, 57 S. E. 826.

Thus, it is held that a provision in a contract for supplying materials for a building, that, if the contractor fails fully to perform it by the time stipulated, he shall pay, as liquidated damages, fifty dollars for every day he shall be in default, does not apply to a case of utter abandonment of the contract by him.<sup>355</sup> So, in a case in Louisiana, the plaintiff agreed to perform certain work for defendant within a given time, and the contract contained a penal clause empowering the defendant to annul the contract and forfeit payment for the work performed, and to resell the contract, in case of abandonment by the plaintiff, or if he failed to complete the work within the time prescribed. The plaintiff did not succeed in completing the work within the time. But it was held that the defendant, who annulled the contract, but failed to resell, could not enforce the penal clause for damages against the plaintiff.<sup>356</sup>

<sup>355</sup> *Gallagher v. Baird*, 54 App. Div. 398, 66 N. Y. Supp. 759.

<sup>356</sup> *Blettry v. City of New Orleans*, 22 La. Ann. 149.

## CHAPTER IX

## DURESS

- § 221. Definition and Essential Elements of Duress.
- 222. Same; Illegality of Demand.
- 223. Same; Duress as Efficient Cause of Action Taken.
- 224. Same; By and Against Whom Plea of Duress Available.
- 225. Duress Renders Contract Voidable, Not Void.
- 226. Duress as Ground for Rescission or Cancellation.
- 227. Degree or Measure of Duress Required.
- 228. Duress by Physical Restraint or Coercion.
- 229. Duress of Goods.
- 230. Taking Advantage of Financial Necessities.
- 231. Duress by Threats.
- 232. Instituting or Threatening Civil Suits or Foreclosures.
- 233. Duress of Imprisonment.
- 234. Threats of Arrest or Criminal Prosecution.
- 235. Prosecution of Husband, Wife, or Relatives.
- 236. Duress Exerted by Government or Municipalities.

§ 221. Definition and Essential Elements of Duress.— Duress is a form of coercion, physical or moral, and is said to exist where one person, by the unlawful act of another, is induced to make or discharge a contract, or to perform or forego some other act affecting his rights of person or property, under circumstances which deprive him of the exercise of his free will, subject him to the will of that other, and constrain him to act contrary to his wishes and inclination.<sup>1</sup> The term is also defined in the codes of several of the states, as follows: "Duress consists in (1) unlawful confinement of the person of the party, or of the husband

<sup>1</sup> Newburyport Water Co. v. City of Newburyport (O. C.) 103 Fed. 584; McAldon v. Van Alstine, 135 Ill. App. 396; Evans v. Thomas, 4 Ky. Law Rep. 629; Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Lewis v. Doyle, 182 Mich. 141, 148 N. W. 407; Knight v. Brown, 137 Mich. 396, 100 N. W. 602; Smithwick v. Whitley, 152 N. C. 369, 67 S. E. 913; Guinn v. Sumpter Valley Ry. Co., 63 Or. 368, 127 Pac. 987; Phillips v. Henry, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706; Peabody v. Tenney, 18 R. I. 498, 30 Atl. 456; City Nat. Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843; Wolff v. Bluhm, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; Batavian Bank v. North, 114 Wis. 637, 90 N. W. 1016. Duress is unlawful constraint whereby one is forced to do some act against his will. Horn v. Davis, 70 Or. 498, 142 Pac. 544. Duress is a condition of mind resulting from such

or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing or oppressive;" and "menace consists in a threat (1) of such duress as is specified in subdivisions one and three of the last section; (2) of unlawful and violent injury to the person or property of any such person as is specified in the last section; or (3) of injury to the character of any such person."<sup>2</sup> So also, in the civil code of Georgia, "duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."<sup>3</sup> The common-law doctrine of duress divided it into duress of imprisonment and duress per minas, the latter being the case where a person is threatened with loss of life or limb or with mayhem or with imprisonment, and it is said that this doctrine is still in force in Missouri, except in so far as it has been modified by the decisions of the courts, and that, in its extensive sense, duress is the degree of constraint which is sufficient to affect the mind of a person of ordinary firmness, and includes the condition of mind, produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power.<sup>4</sup>

It appears, therefore, that, to constitute duress, the means resorted to must for the time being deprive the complaining

improper pressure that the will is overcome and an involuntary act or contract induced; it is a condition of mind produced by an unlawful intimidation, and resulting in the doing of an act which is not required by law. *O'Toole v. Lamson*, 41 App. D. C. 276.

<sup>2</sup> Civ. Code Cal., §§ 1569, 1570; Rev. Civ. Code Mont., §§ 4975, 4976; Rev. Civ. Code N. Dak., §§ 5290, 5291; Rev. Civ. Code S. Dak., §§ 1198, 1199; Rev. Laws Okl. 1910, §§ 900, 901.

<sup>3</sup> Civ. Code Ga. 1910, § 4116. This definition, it is said, includes any conduct overpowering the will and coercing or restraining the performance of an act which otherwise would not have been performed. *Dorsey v. Bryans*, 143 Ga. 186, 84 S. E. 467.

<sup>4</sup> *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6.



party of freedom of choice, so that his act is compelled by the dominant will of another,<sup>5</sup> or he must be deprived of his free will and understanding, so that the contract in question is not his free and voluntary act,<sup>6</sup> or, as it is otherwise expressed, the person affected must be bereft of that quality of mind which is essential to the making of a valid and binding contract.<sup>7</sup> In some of the cases it is said that duress is a mental condition of the party practised upon, such, namely, as to render him incompetent to exercise his free will and choice.<sup>8</sup> Subjectively considered, it may be so. But it seems more correct to regard the external act—the constraint, compulsion, or threat—as constituting the duress, and the psychological state as resulting from it. According to the United States Supreme Court, to constitute coercion or duress which will be regarded as sufficient to make a payment involuntary, “there must be some threatened or actual exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment.”<sup>9</sup>

Whatever may be the means of coercion employed, they must come from without and be exerted by some specific person. One may yield to the pressure of circumstances, or take some course which is repugnant to him, in order to extricate himself from a predicament, but this does not constitute duress if no constraint is exerted by the person benefiting by his action. Thus, where a person who was accused of theft went with the person alleged to have been robbed and others to a private place to discuss the matter, and there the accused man, though asserting his innocence, admitted that the evidence was strong enough to send him to the penitentiary, and gave his note in settlement, saying that he did so to save his family from disgrace, but no

<sup>5</sup> *Van Alstine v. McAlton*, 141 Ill. App. 27.

<sup>6</sup> *Nebraska Mut. Bond Ass'n v. Klee*, 70 Neb. 383, 97 N. W. 476; *Shriver v. McCann* (Tex. Civ. App.) 155 S. W. 317.

<sup>7</sup> *Piekenbrock v. Smith*, 43 Okl. 585, 143 Pac. 675.

<sup>8</sup> *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016.

<sup>9</sup> *Radich v. Hutchins*, 95 U. S. 210, 24 L. Ed. 409.

threats were used by the payee of the note, who, on the contrary, told the maker that he did not intend to prosecute him, it was held that the settlement was not obtained by duress.<sup>10</sup> And again, the fact that money is paid under protest does not make the payment a compulsory one, even though the party may be under no legal obligation to pay.<sup>11</sup> And a written contract cannot be set aside on the ground of duress merely because the one party was reluctant to execute it, while the other insisted on it.<sup>12</sup> So, a grantor's desire to please another by making the conveyance attacked, resulting from long association, affection, or gratitude, does not constitute coercion.<sup>13</sup> But it should be observed that not only is a direct promise void if made under duress and an illegal arrest, but so also is an admission thus made of a former promise, and the jury cannot inquire whether such admission was made because it was true or because the party was under duress.<sup>14</sup>

§ 222. **Same; Illegality of Demand.**—It is also an essential part of the definition of duress that either the means of coercion employed should have been unlawful, or the demand to be enforced or the benefit to be gained by the person exerting the pressure should have been illegal, in the sense that the law would not, by its ordinary processes, have compelled the coerced party to do what he did. Thus, where one, having in his possession property of another, demands as a condition of its restoration, the payment of a sum for which he is legally entitled to a lien from the owner, the latter cannot be said to have made the payment under duress.<sup>15</sup> So, duress by imprisonment will be no defense if the contract procured thereby is a just and equitable one, and one which the defendant was bound to comply with, having derived benefits from it.<sup>16</sup> And a deed executed in obedience to a valid decree of a court is not given under

<sup>10</sup> *Roloson v. De Hart*, 134 Mo. App. 633, 114 S. W. 1122.

<sup>11</sup> *Union Ins. Co. v. City of Allegheny*, 101 Pa. 250.

<sup>12</sup> *Andrews v. Connolly* (C. C.) 145 Fed. 43.

<sup>13</sup> *Nelson v. Wiggins*, 172 Mich. 191, 137 N. W. 623.

<sup>14</sup> *Tilley v. Damon*, 11 Cush. (Mass.) 247.

<sup>15</sup> *In re Meyer* (D. C.) 106 Fed. 828.

<sup>16</sup> *Diller v. Johnson*, 37 Tex. 47.

duress.<sup>17</sup> But it was held in Texas that the order of a military commander in time of war, after martial law has been declared, requiring an act to be performed by a citizen which is contrary to his wish, constitutes duress, although no threats or demonstrations of violence are used at the time the act is performed.<sup>18</sup>

§ 223. **Same; Duress as Efficient Cause of Action Taken.**—To establish duress as ground for the avoidance of a contract, conveyance, or other act, it is not alone sufficient to show the exertion of pressure by threats or even by physical compulsion, but it must also clearly appear that the force or threats employed actually subjugated the mind and will of the person against whom they were directed, and were thus the sole and efficient cause of the action which he took.<sup>19</sup> Even the fact of an unlawful restraint of the person does not give rise to a necessary conclusion that his will was coerced, especially, it is said, where the party is suffered to go at large, and has every assurance that the restraint can only subject him to a little inconvenience.<sup>20</sup> It is so also with threats. In one of the cases, where the plaintiff had accomplished the seduction of the defendant under a promise of marriage, and she became pregnant; it was held that the presence of her father at the solemnization of a marriage between them, carrying two loaded pistols and threatening that if the plaintiff did not marry his daughter there would be trouble, did not establish duress sufficient to avoid the marriage, taking into view the fact that the plaintiff was not a boy, but a man of mature age, the situation in which he was placed, the moral obligation he was under to marry the defendant and legitimize his unborn child, and the fact that he showed himself to be defiant of the father and his pistols, and did not consent to the marriage until different persons had made an appeal to him

<sup>17</sup> *Eldridge v. Trustees of Schools*, 111 Ill. 576.

<sup>18</sup> *Olivari v. Menger*, 39 Tex. 76.

<sup>19</sup> *Sternback v. Friedman*, 23 Misc. Rep. 173, 50 N. Y. Supp. 1025; *Feller v. Green*, 26 Mich. 70; *Stone v. Weiller*, 57 Hun, 588, 10 N. Y. Supp. 828. So also, by the statute law in Georgia, one alleging duress must show that it "actually induced him to do an act contrary to his free will." Civ. Code Ga. 1910, § 4116.

<sup>20</sup> *Feller v. Green*, 26 Mich. 70.

on the ground of justice and humanity, asking him to do the part of an honorable man.<sup>21</sup> And it is a general rule that a transaction cannot be held to have been induced by duress, notwithstanding any threats which may have been made, where the party had and took an opportunity for reflection and for making up his mind, and where he consulted with others and had the benefit of their advice, especially where he was advised by his counsel.<sup>22</sup> In a case in Illinois, a man executed a deed after having been threatened with arrest, treated with personal violence, and menaced with a pistol, but this occurred some time before the deed was signed, and meanwhile a disinterested third person had come into the place and was consulted by the grantor as to the propriety of executing the deed, and it was held that there was no such duress as would avoid the deed.<sup>23</sup>

The lapse of an interval of time between the making of a threat and the performance of the act demanded is a circumstance which should be taken into account in considering whether or not the one was the controlling cause of the other, but it is not determinative of the question one way or the other. On the one hand, the state of terror created in the mind by a threat of really serious harm may continue long after the utterance of the menace. This depends chiefly on the threatened person's belief in the continued power and continued purpose of the other to carry his threat into execution, and on the continued existence of the state of affairs which makes such execution possible. Thus, even though a wife has the benefit of the presence and protection of her husband at the time she actually signs a conveyance, it may still be voidable as extorted from her by duress, if, at the time of execution, she still continues in a state of terror and anxiety induced by threats previously made to her.<sup>24</sup> But on the other hand, however much a

<sup>21</sup> *Meredith v. Meredith*, 79 Mo. App. 636.

<sup>22</sup> *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; *Fred Rueping Leather Co. v. Watke*, 135 Wis. 616, 116 N. W. 174; *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741; *Hagan v. Waldo*, 168 Ill. 646, 48 N. E. 89.

<sup>23</sup> *Rendleman v. Rendleman*, 156 Ill. 568, 41 N. E. 223.

<sup>24</sup> *Nebraska Central B. & L. Ass'n v. McCandless*, 83 Neb. 536, 120 N. W. 134. Where the grantor's wife executed a deed under coercion

person may be appalled by threats or an offer of violence, yet if he afterwards has time to compose his mind, regain his ordinary firmness of disposition, and fortify his position against the possible execution of the threats, it will be necessary for him to show very distinctly that the act which he seeks to avoid was directly controlled by fear, and not the result of his free and deliberate choice; and the strength of the evidence which will be required of him on this point will increase as the intervening time grows longer.<sup>25</sup>

**§ 224. Same; By and Against Whom Plea of Duress Available.**—Duress to avoid a contract or conveyance must be the act of the person against whom it is alleged, performed by himself or by his agent, or it must have been imposed with his knowledge and taken advantage of by him to obtain the contract or conveyance in question; and duress exerted by a third person will not avoid a contract made with one who was not cognizant of it or did not authorize or direct it or participate in it.<sup>26</sup> Thus, for example, duress exercised by a husband over his wife to force her to sign a deed of her property (or to join in his deed) will not vitiate it if the grantee had no knowledge of it, or was not privy to it or did not in any way connive at it or participate in it.<sup>27</sup> And so, a mortgage is not vitiated by force or duress exerted by one of the mortgagors upon the other, but not participated in by the mortgagee.<sup>28</sup> On the same principle, it is said that if one, being attacked by robbers, promises an innocent person a sum of money to deliver him out

by her husband and the grantee, the deed will be void, although acknowledged by her before a justice of the peace as her own act. *Gilley v. Denman*, 185 Ala. 561, 64 South. 97.

<sup>25</sup> *Parker v. Allen*, 33 Tex. Civ. App. 206, 76 S. W. 74; *Iredell v. Klemm*, 3 Pa. Co. Ct. R. 137.

<sup>26</sup> *Ely v. Hartford Life Ins. Co.*, 33 Ky. Law Rep. 272, 110 S. W. 265; *Hintz v. Hintz*, 222 Ill. 248, 78 N. E. 565; *Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 695; *Mullin v. Leamy*, 80 N. J. Law, 484, 79 Atl. 257; *Osborn v. Robbins*, 7 Lans. (N. Y.) 44; *Guinn v. Sumpter Valley Ry. Co.*, 63 Or. 368, 127 Pac. 987.

<sup>27</sup> *Hughie v. Hammett*, 105 Ga. 368, 31 S. E. 109; *Harper v. McGoogan*, 107 Ark. 10, 154 S. W. 187; *Rogers v. Adams*, 66 Ala. 600; *Iine v. Blizzard*, 70 Ind. 23; *Fightmaster v. Levi* (Ky.) 17 S. W. 195. But see *Brown v. Peck*, 2 Wis. 261.

<sup>28</sup> *Robinson v. Randall*, 147 Ky. 45, 143 S. W. 769.

of their hands, the obligation is valid, though contracted under the influence of the fear of death.<sup>29</sup> In another case, defense was made to the enforcement of a contract for the sale of lands on the ground that it was made when the vendor was under duress, having been severely beaten by a mob and driven from the county. It was shown that the purchaser knew of the beating, but not that he was implicated in it, and the contract was held valid and enforceable.<sup>30</sup> Again, a written contract by which the manager of a steamship company employed the libelant as master for two years, signed on board the vessel where libelant had gone to take charge, but in pursuance of a prior agreement, cannot be avoided for duress on the manager's testimony that the vessel was surrounded by strikers in tugs, who had imperiled his life, and that he signed in order to get the vessel into commission, on libelant's refusal to accept the employment without such contract.<sup>31</sup> It is not necessary, however, that threats of injury to person or property, made to procure the execution of a contract, should be made directly to the person to be influenced, if they are made to a third person with intent that they should be communicated to him and are so communicated.<sup>32</sup>

It is also a general rule that duress can be pleaded only by the party upon whom it was exercised and whom it influenced; and that any other party to the same contract, not so influenced, will be bound by the contract.<sup>33</sup> But it seems that one whose connection with the contract is that of a surety may avail himself of the defense that the contract was extorted from his principal by duress, provided that he signed the obligation without knowledge of the duress.<sup>34</sup>

<sup>29</sup> *Dimmitt v. Robbins*, 74 Tex. 441, 12 S. W. 94.

<sup>30</sup> *Talley v. Robinson*, 22 Grat. (Va.) 888.

<sup>31</sup> *Jenkins S. S. Co. v. Preston*, 186 Fed. 609, 108 C. C. A. 473.

<sup>32</sup> *Price v. Bank of Poynette*, 144 Wis. 190, 128 N. W. 895.

<sup>33</sup> *Robinson v. Gould*, 11 Cush. (Mass.) 55.

<sup>34</sup> *Hazard v. Griswold* (C. C.) 21 Fed. 178; *Bowman v. Hiller*, 130 Mass. 153, 39 Am. Rep. 442; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Schuster v. Arena*, 83 N. J. Law, 79, 84 Atl. 723; *Osborn v. Robbins*, 36 N. Y. 365; *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185; *Griffith v. Sitgreaves*, 90 Pa. 161. But see *George Colon & Co. v. East 189th Street Bldg. & Const. Co.*, 141 App. Div. 441, 126 N. Y. Supp. 226.

**§ 225. Duress Renders Contract Voidable, Not Void.—** A contract or conveyance obtained by means of duress is ordinarily voidable at the election of the party coerced, but not entirely void,<sup>35</sup> except, perhaps, in cases where the duress was so severe and overwhelming that the person on whom it was imposed was converted into a mere automaton.<sup>36</sup> This means that the transaction cannot be treated as a mere nullity, but that the injured party has his election either to repudiate it or to ratify and affirm it.<sup>37</sup> If he chooses to repudiate it, his decision must be distinctly declared, and he must exercise his option within a reasonable time,<sup>38</sup> and ordinarily he must restore the status quo by returning to the other party any benefits or considerations which he may have received under the contract.<sup>39</sup> On the other hand, though the contract may be voidable for duress, yet it may be rendered valid by a subsequent ratification,<sup>40</sup> and such ratification may be inferred from the conduct of the party,<sup>41</sup> as, for instance, where he accepts and retains the benefits flowing to him from the contract,<sup>42</sup> or where he makes payments under the contract from time to time and allows a period of several years to elapse without seeking any redress.<sup>43</sup> So, in a suit to set aside a mortgage as having been procured by duress, proof of the subsequent voluntary execution by the complainant of an instrument

<sup>35</sup> *Carter v. Couch*, 84 Fed. 735, 28 C. C. A. 520; *Kline v. Kline*, 14 Ariz. 369, 128 Pac. 805; *Veach v. Thompson*, 15 Iowa, 380; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657; *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6; *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082; *George Colon & Co. v. East 189th Street Bldg. & Const. Co.*, 141 App. Div. 441, 126 N. Y. Supp. 226; *Doolittle v. McCullough*, 7 Ohio St. 299; *Baldwin v. Murphy*, 82 Ill. 485; *Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. 19.

<sup>36</sup> *Royal v. Goss*, 154 Ala. 117, 45 South. 231.

<sup>37</sup> *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Knowlton v. Ross*, 114 Me. 18, 95 Atl. 281.

<sup>38</sup> *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129.

<sup>39</sup> *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6.

<sup>40</sup> *Brown v. Worthington*, 152 Mo. App. 351, 133 S. W. 93.

<sup>41</sup> *Schee v. McQuilken*, 59 Ind. 269.

<sup>42</sup> *Connolly v. Bouck*, 174 Fed. 312, 98 C. C. A. 184.

<sup>43</sup> *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902.



which operated as a ratification of such mortgage, with full knowledge of the facts, establishes prima facie the defense of ratification; and assuming that a knowledge by the complainant of his legal right to disaffirm was essential to a valid ratification, the burden of going forward with evidence to prove want of such knowledge rests upon the complainant.<sup>44</sup>

**§ 226. Duress as Ground for Rescission or Cancellation.** A party as to whom a contract is voidable for duress has the right to rescind it for that cause, provided he acts with reasonable promptness. This is the rule of the common law, and it is also enacted into statute law in some of the states, as, for instance, where it is provided that "a party to a contract may rescind the same, if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."<sup>45</sup> Moreover, it is within the jurisdiction of a court of equity to set aside or cancel, for the cause of duress, a deed conveying real property,<sup>46</sup> or a mortgage, if given for a debt which the plaintiff did not owe, and if the bill is filed before the maturity of the instrument,<sup>47</sup> or a simple contract,<sup>48</sup> or even a promissory note.<sup>49</sup> But duress is not of itself a distinct ground of equitable jurisdiction. For this purpose it is treated as a species of fraud, particularly when employed as a means of obtaining a gift, grant, or conveyance of property.<sup>50</sup> And the limits and conditions upon the right of

<sup>44</sup> *National City Bank v. Wagner*, 216 Fed. 473, 132 C. O. A. 533.

<sup>45</sup> Civ. Code Cal., § 1689; Rev. Civ. Code Mont., § 5063; Rev. Civ. Code N. Dak., § 5378; Rev. Civ. Code S. Dak., § 1283; Rev. Laws Okl. 1910, § 984.

<sup>46</sup> *Bray v. Thatcher*, 28 Mo. 129; *Anderson v. Anderson*, 17 N. D. 275, 115 N. W. 836; *Kline v. Kline*, 14 Ariz. 369, 128 Pac. 805. See *London v. Crow*, 46 Tex. Civ. App. 190, 102 S. W. 177.

<sup>47</sup> *Fry v. Piersol*, 166 Mo. 429, 66 S. W. 171; *Kingsley v. Kingsley*, 130 Ill. App. 53.

<sup>48</sup> *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129.

<sup>49</sup> *Kingsley v. Kingsley*, 130 Ill. App. 53.

<sup>50</sup> *Treadwell v. Torbert*, 133 Ala. 504, 32 South. 126. And see *Eureka Bank v. Bay*, 90 Kan. 506, 135 Pac. 584.

rescission of a contract obtained by fraud apply generally to agreements voidable for duress.<sup>51</sup> Thus, a party who means to avoid a transaction into which he was forced against his will is required to act with reasonable promptness after the duress is removed,<sup>52</sup> and also he is generally bound to restore the other party to the same position he occupied before the contract or conveyance was made, and restore to him all that he has received in execution of it.<sup>53</sup> Nor will equity be disposed to interfere in this class of cases if there is an adequate remedy at law. Thus, the fact that a note was executed under duress is a defense which may be made at law, and hence, when a bill for an injunction against the enforcement of the note shows that an action thereon is pending, and it does not appear from anything stated in the bill that such defense at law is in any way embarrassed or inadequate, equity will not entertain jurisdiction.<sup>54</sup> And so, where the grantor in a deed which was procured by duress is not in possession of the land, and can bring ejectment, he cannot maintain an action in equity to cancel the deed or remove the cloud from his title.<sup>55</sup> And even where jurisdiction is undoubted, to justify a court in rescinding a contract on the ground of duress, the testimony must be cogent, and the case must be made out by a clear preponderance of the evidence, and the complainant must make out such a case as will overcome the presumption of fair dealing.<sup>56</sup> Further, it must appear that the act brought about by the exertion of duress was injurious to the party coerced or gave an unlawful benefit or advantage to the other party. For instance, where there is a voluntary delivery of a deed, with intent to pass title, and the grantor afterwards regains possession, it is no ground for setting

<sup>51</sup> *Royal v. Goss*, 154 Ala. 117, 45 South. 231.

<sup>52</sup> *Wood v. Kansas City Home Telephone Co.*, 223 Mo. 537, 123 S. W. 6.

<sup>53</sup> See *Ring v. Ring*, 127 App. Div. 411, 111 N. Y. Supp. 713; *Davis v. Van Wie* (Tex. Civ. App.) 30 S. W. 492; *Van Dyke v. Wood*, 60 App. Div. 208, 70 N. Y. Supp. 324.

<sup>54</sup> *McLin v. Marshall*, 1 Helsk. (Tenn.) 678.

<sup>55</sup> *Treadwell v. Torbert*, 133 Ala. 504, 32 South. 126.

<sup>56</sup> *Lewis v. Doyle*, 182 Mich. 141, 148 N. W. 407.

aside the deed that the grantee subsequently obtained a re-delivery by duress, as the first delivery vested title in him.<sup>57</sup>

§ 227. **Degree or Measure of Duress Required.**—The rule of the common law was that, in order to constitute duress by threats, they must have been such as would intimidate a person of ordinary firmness and overcome his mind and will.<sup>58</sup> But it was one of the chief defects of the common law that it made no sufficient allowance for the inevitable differences between men, in respect to their intelligence, character, and disposition. Setting up an unvarying and purely abstract standard—such as the conduct to be expected of a “man of ordinary prudence” or a “person of ordinary firmness”—it required all persons whatever to conform to it, on pain of being denied relief in the courts. Thus a person of less than average intelligence and sagacity, provided he was not a “lunatic,” could easily and safely be victimized by sharpers, and one of a timid and yielding disposition could expect little aid from the law when coerced by the strong and rapacious. But the viewpoint of equity is different. The “correction of that wherein the law, by reason of its universality, is deficient” is precisely the function of equity. Hence in the forum of chancery the inquiry is not so much whether a normal, average, or ordinary person would have been deceived by the trick practised or the duress exerted, but whether, in the particular case before the court, that result was actually produced. Happily the common-law rule stated above is now almost universally abandoned, and the more just and reasonable rule of equity has taken its place. That is to say, in order to constitute duress such as will render a contract voidable, it is not now considered essential that the means employed should be such as are reasonably necessary to control by fear the free will of a person of ordinary firmness and courage, but the question is whether the particular person under considera-

<sup>57</sup> *McCrum v. McCrum*, 127 Iowa, 540, 103 N. W. 771.

<sup>58</sup> *Walbridge v. Arnold*, 21 Conn. 424; *Buchanan v. Sahlein*, 9 Mo. App. 552; *Bryant v. Levy*, 52 La. Ann. 1649, 28 South. 191; *United States Banking Co. v. Veale*, 84 Kan. 385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; *Hill v. Thixton*, 13 Ky. Law Rep. 333; *Kline v. Kline*, 14 Ariz. 369, 128 Pac. 805; *Ford v. Engleman* (Va.) 86 S. E. 852.

tion was so influenced as to be bereft of the quality of mind essential to the making of a valid contract.<sup>59</sup> It makes no essential difference what means are employed to coerce or constrain a party into executing an instrument against his will, provided that the means employed are calculated to produce that effect and do produce it, and anything may constitute duress which prevents the party from acting freely and voluntarily.<sup>60</sup> As otherwise stated, whether a contract is the result of duress depends not so much on the means by which the party was compelled to execute the contract as on the state of mind induced by the means employed, and the fear which made it impossible for him to exercise his free will.<sup>61</sup> Hence, all the circumstances of the particular case bearing on the question of actual intimidation may and should be taken into account, such as the advanced age of the person concerned, his state of health or physical or mental infirmity, sex, his attitude or bearing towards danger in general, all the surrounding circumstances, family conditions, and the reputation of the party making the threats as a violent or dangerous man.<sup>62</sup> And threats which induced the execution of an instrument by an old, feeble, infirm, or unprotected person may amount to duress, even though they would have made no impression on a vigorous and resolute person.<sup>63</sup> "Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them

<sup>59</sup> *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417; *Nebraska Mut. Bond Ass'n v. Klee*, 70 Neb. 383, 97 N. W. 476; *Overstreet v. Dunlap*, 56 Ill. App. 486; *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069.

<sup>60</sup> *Schoellhamer v. Rometsch*, 26 Or. 394, 38 Pac. 344.

<sup>61</sup> *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84; *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185; *Williamson-Halsell-Frazier Co. v. Ackerman*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484.

<sup>62</sup> *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Jordan v. Elliott*, 12 Wkly. Notes Cas. (Pa.) 56; *Gate City Nat. Bank v. Elliott* (Mo.) 181 S. W. 25.

<sup>63</sup> *Anthony & Cowell Co. v. Brown*, 214 Mass. 439, 101 N. E. 1056; *Sulzner v. Cappeau*, *Lemley & Miller Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421; *Hick v. Thomas*, 90 Cal. 289, 27 Pac. 208, 376.

to be robbed by the unscrupulous because they are so unfortunately constituted.”<sup>64</sup> So, in a case in California it was said: “Circumstances are stated which show great oppression and undue influence, well calculated to overcome the judgment and will of such a person as the plaintiff. An intelligent, strong man would not be likely to be influenced by such representations and threats, and the plaintiff must have known that his [defendant’s] assertions as to the verbal contract were untrue, but they were accompanied by threats that he could prove his assertions, and would compel her to adopt his version of the contract, and if she did not, he would get the property from her upon a tax deed. Representations which are very unreasonable, accompanied by threats, may well be held to have influenced a sick, weak-minded, foolish woman, who was without advisers or friends. The material question in such cases is whether, by such fraudulent practices, she has in fact been wronged, although, as a general rule, where people are so reckless of their own interests, courts may not interfere to relieve them from their folly. The weakness of the plaintiff constitutes a very important element in her case.”<sup>65</sup> So, in another case: “The law extends its protection to an individual, without reference to whether he is strong or weak intellectually, and refuses to measure his rights by an arbitrary yardstick avowedly applicable only to men of ordinary intelligence, firmness, and courage.”<sup>66</sup> In other cases substantially the same rule has been otherwise stated as follows: The test is not whether the threats would have intimidated a man of ordinary firmness, nor whether they should reasonably have intimidated a person of such a degree of firmness as the one in question did actually possess, but whether the person in question, presumably of ordinary firmness, did actually and reasonably fear injury from the execution of the threats, and act under the influence of that fear.<sup>67</sup> And again, the question of yielding to duress does not depend on the probable or physical ability of the party complaining to defend

<sup>64</sup> *Parmentier v. Pater*, 13 Or. 121, 9 Pac. 59.

<sup>65</sup> *Hick v. Thomas*, 90 Cal. 289, 27 Pac. 208, 376.

<sup>66</sup> *Nebraska Mut. Bond Ass'n v. Klee*, 70 Neb. 383, 97 N. W. 476.

<sup>67</sup> *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560.

himself against the threatened imprisonment or other injury. The party threatened is not required first to submit to wager of battle and be overcome before the duress is complete.<sup>68</sup> But many of the modern decisions have gone far beyond even these principles, rejecting altogether the common-law tests, and holding that relief in equity may be granted to a party who executed a contract or other instrument under the compelling influence of harshness, cruelty, distress, financial embarrassment, or apprehensions, and believing that he was unable to help himself or to avoid doing what was demanded of him, although the circumstances would not amount to technical duress, or although there was no actual duress whatever in the sense of the common law.<sup>69</sup>

Much less force or putting in fear by a husband will amount to coercion which will avoid the deed of his wife than would be necessary if it proceeded from a stranger.<sup>70</sup> And a less measure of severity or compulsion will suffice to set in motion the powers of a court of equity when exerted upon a person of naturally feeble intelligence, or whose mind is confused and his judgment unsettled, by the terror induced by his situation or by the threats made against him.<sup>71</sup> Thus, a deed may be set aside upon showing that it was induced by a systematic and continuous course of cruel and inhuman treatment, as a result of which the grantor's health declined and his mental condition became such that he was incapable of transacting ordinary business understandingly.<sup>72</sup> And so, to an action on a note by the payee against

<sup>68</sup> *King v. Rowan*, 1 Tenn. Cas. 269.

<sup>69</sup> *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Buford v. Louisville & N. R. Co.*, 82 Ky. 286; *Lappin v. Crawford*, 221 Mo. 380, 120 S. W. 605; *Faulkner v. Faulkner*, 162 App. Div. 848, 147 N. Y. Supp. 745; *Rees v. Schmits*, 164 Ill. App. 250; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350; *Davis v. Luster*, 64 Mo. 43; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8. Contra, *Miller v. Miller*, 68 Pa. 486.

<sup>70</sup> *Richardson v. Hittle*, 81 Ind. 119; *Royal v. Goss*, 154 Ala. 117, 45 South. 231.

<sup>71</sup> *Kuelkamp v. Hidding*, 31 Wis. 503; *Anderson v. Anderson*, 122 Wis. 480, 100 N. W. 829.

<sup>72</sup> *Huston v. Smith*, 248 Ill. 396, 94 N. E. 63.

the maker it is a good defense, even at law, that the note was obtained from the maker when he was delirious, for the services of the payee as a physician, when in fact he was not a physician, and his medical attentions to the maker were actually injurious.<sup>73</sup> But no amount of persuasion, entreaty, advice, or urgency, to influence one to exercise his will to some particular end, will amount to duress,<sup>74</sup> and the mere fact that one executed an instrument reluctantly and protesting against it does not show that he was so far under compulsion as to cease acting as a free moral agent.<sup>75</sup> And again, a person cannot have his deed or mortgage avoided on the ground of duress, when the motive which prompted him to execute it was not alone fear or coercion, but also the advice of his lawyer, who told him to sign it and that it could afterwards be set aside.<sup>76</sup>

Moreover, to constitute duress, the making of threats must not only be shown, but it must also appear that they did actually operate upon the mind of the person concerned and constituted the controlling motive for the performance of the act sought to be avoided.<sup>77</sup> And even though duress existed, it will not ordinarily invalidate a contract entered into with full knowledge of all the facts and with ample time for deliberation and for consultation with friends or advisers.<sup>78</sup> And to avoid a deed of a wife for duress, it is not enough to show that her husband was a violent, turbulent, and intemperate man in his habits, and prone to quarrels and violence when drunk, and that he was domineering towards his wife, and that she was in the habit of obeying all his commands, but the duress must be clearly and distinctly proved.<sup>79</sup>

<sup>73</sup> *Peyton v. Rawlens*, 4 Hayw. (Tenn.) 77.

<sup>74</sup> *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016; *Zuccarello v. Randolph* (Tenn. Ch. App.) 58 S. W. 453; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657; *International Text Book Co. v. Anderson*, 179 Mo. App. 631, 162 S. W. 641.

<sup>75</sup> *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.

<sup>76</sup> *Detroit Nat. Bank v. Blodgett*, 115 Mich. 160, 73 N. W. 120, 885.

<sup>77</sup> *Wilkerson v. Bishop*, 7 Cold. (Tenn.) 24.

<sup>78</sup> *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657.

<sup>79</sup> *Freeman v. Wilson*, 51 Miss. 329.



§ 228. **Duress by Physical Restraint or Coercion.**—When a person is isolated from his friends, shut up in a room or other place, kept there by physical restraint or a display of force, and required to execute a note, deed, or other instrument as the only means of obtaining his deliverance, and yields to the pressure thus exerted, the instrument so given is voidable for duress.<sup>80</sup> So where the person named as grantee in a deed procures its execution by forcibly taking the hand of the grantor, who is insensible or too sick and feeble to offer any effectual resistance, placing a pen in it, and making a mark on the paper for the signature of the grantor, the instrument so executed is a mere nullity, in consequence of the duress exerted, and it is said that it is not even necessary to disaffirm it in order to have it set aside.<sup>81</sup>

§ 229. **Duress of Goods.**—Under the law as now settled, there may be duress of goods as well as duress of the person. Or perhaps it is more correct to say that the state of mind which is the essential product of duress, namely, a condition in which the party's free choice and will are taken away and he is coerced into doing something against his wish, may be produced by an illegal restraint of his property as well as of his person. Hence the rule that one who pays money, gives a note, or grants any other concession demanded of him, through necessity and in order to obtain the possession of his property which is unlawfully withheld from him by another, may afterwards avoid the transaction on the ground of compulsion, even though it may not amount to technical duress, and especially where the detention of the property works an immediate hardship or will result in an irreparable injury.<sup>82</sup> And this rule obtains, it

<sup>80</sup> *McNair v. Benson*, 63 Or. 66, 126 Pac. 20; *Schuster v. Arena*, 83 N. J. Law, 79, 84 Atl. 723; *Evans v. Begleys*, 2 Wend. (N. Y.) 243. And see *Fairchild v. Fairchild* (N. J. Ch.) 44 Atl. 944.

<sup>81</sup> *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678. And see *Moran v. Moran* (City Ct.) 19 N. Y. Supp. 673.

<sup>82</sup> *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *Fuller v. Roberts*, 35 Fla. 110, 17 South. 359; *Spalds v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *Callendar Sav. Bank v. Loos*, 142 Iowa, 1, 120 N. W. 317; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Wilkerson v. Hood*, 65 Mo. App. 491; *Fitzgerald v. Fitzgerald & Mallory Const.*

is said, even in cases where there was nothing to prevent the owner from recovering his property by replevin.<sup>83</sup> In the leading case on this point, the plaintiff had pledged goods with a pawnbroker for a certain sum, and offered to redeem them, but the pawnbroker refused to surrender them unless he was paid an additional sum, under the guise of interest, which he had no right to exact. The plaintiff paid what was demanded, and was held entitled to recover back the amount illegally exacted, as having been paid under compulsion.<sup>84</sup> In a case in the Supreme Court of the United States, where parties contracted to buy certain cattle and paid a large sum, leaving a small balance due, and could not get possession without completing the stipulated payment, though a part of the property had been transferred to another party, and, unless he took possession of the property, would be at a great risk of loss from want of care during the winter, then just beginning, it was held that the payment of the balance was made under duress.<sup>85</sup> So, a threat to levy on a person's stock and drive it off the farm unless he gives a note in satisfaction of an old and outlawed judgment, which is falsely represented as being still in force, may constitute duress of his goods.<sup>86</sup> In a case in Alabama, a suit was brought to cancel a note and mortgage as having been given under duress. It was shown that the plaintiffs were conducting a laundry business, in which they were obliged to employ horses and wagons; that the horses were kept at defendant's livery barn, and that he refused to let the plaintiffs take them out, unless they would give him a note secured by mortgage for a sum which he claimed to be due to him for boarding the horses; that plaintiffs did

Co., 44 Neb. 463, 62 N. W. 899; *Harmony v. Bingham*, 12 N. Y. 117, 62 Am. Dec. 142; *Stenton v. Jerome*, 54 N. Y. 480; *United States Nickel Co. v. Barrett*, 86 Misc. Rep. 337, 148 N. Y. Supp. 325; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Smithwick v. Whitley*, 152 N. C. 369, 67 S. E. 913; *Mays v. Cincinnati*, 1 Ohio St. 268; *Astley v. Reynolds*, 2 Strange, 915; *Ashmole v. Wainwright*, 2 Q. B. 837.

<sup>83</sup> *Wilkerson v. Hood*, 65 Mo. App. 491.

<sup>84</sup> *Astley v. Reynolds*, 2 Strange, 915.

<sup>85</sup> *Lonergan v. Buford*, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569.

<sup>86</sup> *McCormick Harvesting Machine Co. v. Mays* (Tex. Civ. App.) 33 S. W. 883.

not admit that any such sum was due to defendant, but that they had tendered him the proper amount; that plaintiffs' business would be ruined unless they could obtain their horses, which the defendant well knew; and that, as the plaintiffs had no legal remedy whereby they could secure possession of their property without such a delay as would destroy their business, they yielded to the defendant's demands and gave the note and mortgage in question. On these facts it was held that a proper case was made out for cancellation of the instruments.<sup>87</sup> In another case, an aged and infirm man put \$2,500 worth of bonds in a safe-deposit box in the name of his daughter-in-law as trustee, with the understanding that she was to collect and pay over the interest and to surrender the bonds on demand, but she afterwards refused to deliver to him \$1,000 in bonds at his request, unless he would sign a writing relinquishing his claim to the remainder of the bonds. To this he acceded from the necessity of the case, and it was held that the writing was obtained from him by both duress and undue influence.<sup>88</sup> The same principle was applied in a case where the grantee in a deed, who was the son-in-law of the grantors, went to their home when they were both so sick as to be nearly helpless and took away their dead daughter's watch, declaring that he would not return it unless they deeded him certain land, and further making violent threats as to what he would do if they refused to sign the deed. Later he brought a justice of the peace to the house and had him draw up such a deed, which the grantors then signed. It was held that the deed was obtained by duress and was void.<sup>89</sup>

It is also a rule that duress may be exerted not only over goods which are intrinsically valuable or useful to the owner, but also over such as are important only as securities or as evidence. Thus, where one obtains possession of a deed belonging to another, and uses it for the purpose of extorting money, by the threat that he will destroy it, or that he will not surrender it or permit the owner to use it

<sup>87</sup> *Glass v. Haygood*, 133 Ala. 489, 31 South. 973.

<sup>88</sup> *Puff v. Puff*, 31 Ky. Law Rep. 939, 104 S. W. 332.

<sup>89</sup> *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103.

in defending his title, unless his demands are met, a payment made to recover the deed will be considered as involuntary.<sup>90</sup> Real estate may also be in duress, as in cases where there is an illegal demand made against the owner, coupled with a present power or authority in the person making such demand to sell or dispose of the property if payment is not made as demanded.<sup>91</sup> And it is held that a promise to pay rent, or the yielding to any other unlawful demand, made solely to prevent an unlawful eviction, is not binding upon the promisor.<sup>92</sup>

But the act of the party compelling the unwilling obedience must be unlawful or wrongful, and there can be no duress of goods in law where the act done or threatened is nothing more than the party has a legal right to do.<sup>93</sup> Again, the fact of duress of goods depends upon the right of the party to demand them as his property; and when one has in fact no right to demand goods except upon the performance of terms or conditions imposed by law, it is not duress for the other party to refuse to deliver them except upon those conditions.<sup>94</sup> And further, where the only interest of a party in certain property is by way of chattel mortgage to secure a debt, and the only necessity for obtaining possession of it is to make it available as such security, the concealment of it by the mortgagor cannot be regarded as such duress of goods as to avoid a contract made by the mortgagee in reference thereto.<sup>95</sup>

**§ 230. Taking Advantage of Financial Necessities.—**Where no actual or threatened constraint is offered to one's person or property, it is not duress in law, however reprehensible in morals, to take advantage of his financial embarrassment or distress, of the necessities of his business, of

<sup>90</sup> *Motz v. Mitchell*, 91 Pa. 114.

<sup>91</sup> *Mariposa Co. v. Bowman, Deady*, 228, Fed. Cas. No. 9,089.

<sup>92</sup> *Smith v. Coker*, 110 Ga. 654, 36 S. E. 107; *Findley v. Hulsey*, 79 Ga. 670, 4 S. E. 902. But see *Dunfee v. Childs*, 59 W. Va. 225, 53 S. E. 209.

<sup>93</sup> *Fuller v. Roberts*, 35 Fla. 110, 17 South. 359; *Kansas City, M. & O. Ry. Co. v. Graham* (Tex. Civ. App.) 145 S. W. 632; *Buck v. Houghtaling*, 110 App. Div. 52, 96 N. Y. Supp. 1034.

<sup>94</sup> *Block v. United States*, 8 Ct. Cl. 461.

<sup>95</sup> *Williams v. Phelps*, 16 Wis. 80.

a critical situation in his affairs, or of his impending ruin, and thereby to extort from him a payment or concession to which he would not have acceded if free from pecuniary pressure.<sup>96</sup> Thus, the fact that one accepts payment of part of what is due to him on a contract and gives his receipt for payment in full, only because he needs the money immediately to save him from financial ruin, is not duress and does not affect the conclusiveness of the settlement.<sup>97</sup> And the refusal of a purchaser to pay the contract price on the ground of false representations, and the acceptance by the seller of a less sum on account of financial embarrassment, does not constitute duress if the purchaser has done nothing unlawful to cause such financial embarrassment.<sup>98</sup> In one of the cases on this subject, it appeared that a company contracted to keep the defendant supplied with ice during a certain period at a fixed price, but during that period, on account of a shortage in the ice crop, refused to continue deliveries under its contract, and demanded a higher price, which defendant acceded to and gave his note for the price, only because he had on hand a large quantity of commodities which would be spoiled if he could not get ice; but it was held that this was not legal duress.<sup>99</sup> In another case, a baker, being deserted by his journeymen, applied to a bakers' union for other men, and was refused aid unless he would give his note to the union for a sum charged as the price of its assistance. In an action on the note so given, it was held that it was no duty of the union to supply de-

<sup>96</sup> *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852; *Domenico v. Alaska Packers' Ass'n* (D. C.) 112 Fed. 554; *Smith v. McCourt*, 8 Colo. App. 146, 45 Pac. 239; *Olson v. Ostby*, 178 Ill. App. 165; *Buford v. Louisville & N. R. Co.*, 5 Ky. Law Rep. 503; *Crook v. Tensas Basin Levee Dist.*, 51 La. Ann. 285, 25 South. 88; *Emery v. Lowell*, 127 Mass. 138; *Joyce v. Grownney*, 154 Mo. 253, 55 S. W. 466; *Colonial Trust Co. v. Hoffstot*, 219 Pa. 497, 69 Atl. 52; *Palmer v. Bosley* (Tenn. Ch. App.) 62 S. W. 195; *Sanborn v. Bush*, 41 Tex. Civ. App. 24, 91 S. W. 883; *Custin v. Viroqua*, 67 Wis. 314, 30 N. W. 515.

<sup>97</sup> *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Miller v. Coates*, 4 Thomp. & C. (N. Y.) 429.

<sup>98</sup> *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202.

<sup>99</sup> *Goebel v. Linn*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723. And see *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938.

fendant with workmen, and that its refusal to do so except upon being compensated did not constitute duress.<sup>100</sup> So, threats made by one member of a mining partnership to another that, unless the latter will sign a contract presented to him, the former will advance no more money to develop the mine, which will in consequence be shut down and rendered worthless, do not constitute duress such as to invalidate the contract.<sup>101</sup> And one purchasing liquor from an illegal combination of distillers which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily and not under duress.<sup>102</sup> So, the fear of being suspended or of losing his membership in a stock exchange, for violation of its rules, is not such duress exerted upon a member as to invalidate a contract induced thereby.<sup>103</sup> And the fact that plaintiff, in order to make an advantageous agreement with other stockholders in a corporation and relieve the corporate property from a receivership, is forced to accede to exorbitant demands of an individual creditor of his, who has bought up the claims against the corporation, is not duress entitling him to rescind and recover the property conveyed under the alleged duress.<sup>104</sup>

But there has been much protest against this rule, and it is evident that, if strictly applied in all cases, it would often compel the courts to connive at very iniquitous transactions. In several noteworthy cases it has been frankly rejected, the courts holding that a contract or conveyance may be avoided when it is shown to have been extorted from a party by taking an unconscionable advantage of his business necessities or financial distress, on the ground that such conduct is a species of fraud, and that, even if it does not amount to technical duress, still it places the injured party under a form of compulsion which is quite as effective, and which, being used as a means of oppression,

<sup>100</sup> *Graboski v. Gewerz* (Com. Pl.) 17 N. Y. Supp. 528.

<sup>101</sup> *Connolly v. Bouck*, 174 Fed. 312, 98 C. C. A. 184.

<sup>102</sup> *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

<sup>103</sup> *White v. Baxter*, 41 N. Y. Super. Ct. 358.

<sup>104</sup> *Dustin v. Farrelly*, 81 Mo. App. 380.

makes an equally strong appeal to a court of equity.<sup>105</sup> Thus, in one of the cases, it was shown that, after the foreclosure of a mortgage, the mortgagee agreed to reconvey the land to the mortgagor on receipt of a certain sum by a specified date, and that the defendant, for a commission which he received, agreed to procure a loan of the amount needed for the mortgagor. But he neglected to close the loan until late in the afternoon of the last day allowed for payment, and then, after the mortgagor had signed notes and a trust to the lender, the defendant, taking advantage of the mortgagor's extremity, and without consideration, compelled him to execute two notes for \$500 each to him, secured by a second trust deed, on pain of his refusal to complete the loan, which to his knowledge would have resulted in the mortgagor's losing the right to redeem. It was held that equity would grant relief by canceling the second trust and the notes given to the defendant.<sup>106</sup> So, in a case in New York, a husband conveyed to his wife land worth more than her inchoate right of dower in all his lands, in consideration of her agreement to release her dower rights in any lands of his, when requested, without further consideration. Thereafter, judgment of foreclosure having been entered on a mortgage on certain of his lands, and he being unable to pay the mortgage and having sold such lands pending suit, she, with intention to oppress him, to take advantage of his necessities, and to extort from him an unconscionable consideration for releasing her apparent right of dower in such lands, refused to release the same unless he should convey to her certain other lands, and he yielded to her demand under compulsion of his necessities. It was held that the latter deed to her was procured by duress and should be set aside.<sup>107</sup> So again, army supplies having been paid for by United States vouchers which were evidences of indebtedness, the Secretary of War appointed

<sup>105</sup> *Rees v. Schmits*, 164 Ill. App. 250; *Buford v. Louisville & N. R. Co.*, 82 Ky. 286; *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350; *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902; *Faulkner v. Faulkner*, 162 App. Div. 848, 147 N. Y. Supp. 745.

<sup>106</sup> *Lapplin v. Crawford*, 221 Mo. 380, 120 S. W. 605.

<sup>107</sup> *Van Dyke v. Wood*, 60 App. Div. 208, 70 N. Y. Supp. 324.



a military commission and required their approval of vouchers as a condition precedent to their payment. An army contractor presented to the commission four vouchers, and three were approved, but the fourth was ordered reduced in amount. The contractor refused to acquiesce in the reduction, and the commission then refused to return the three approved vouchers except on the contractor's signing a receipt in full for all four vouchers. Being in failing circumstances, the contractor gave the required receipt to avoid bankruptcy, and it was held that it had been obtained by duress and was void.<sup>108</sup> So, in an early case in Massachusetts, an actor, by misrepresentations, secured an engagement at a theater at a salary greater than the real value of his services, and after the play was set, he refused to act unless paid the amount agreed. It was held that the payment was compulsory, the court saying: "We think this was a species of constraint sufficient to excuse the plaintiff in paying the money."<sup>109</sup> It should also be observed that in some states (as, for instance, Oklahoma) the statutes make duress include "taking a grossly oppressive and unfair advantage of another's necessities or distress," and under such a provision it has been held that the refusal by a purchaser in possession of personal property to pay for it, to satisfy a mortgage lien on it, or to release it, unless the seller will execute a certain contract, where both parties understand that this threat, if persisted in, will lead to an immediate foreclosure and the ruin of the seller, amounts to duress which will avoid the contract.<sup>110</sup> Finally, it has been pointed out in another place that one who obtains property for a grossly inadequate consideration by taking an unconscionable advantage of another's financial embarrassment is liable to an action for rescission or cancellation on the ground of the inadequacy, even if no duress be present.<sup>111</sup>

<sup>108</sup> *Livingston v. United States*, 3 Ct. Cl. 131.

<sup>109</sup> *Dana v. Kemble*, 17 Pick. (Mass.) 545.

<sup>110</sup> *Snyder v. Rosenbaum*, 215 U. S. 261, 30 Sup. Ct. 73, 54 L. Ed. 186.

<sup>111</sup> *Supra*, § 171.

§ 231. **Duress by Threats.**—Under the modern rules, duress may be exercised by threats of inflicting injury, no less than by imprisonment or other actual physical coercion, provided, that is, that the threat is accompanied by such real or apparent ability to carry it into immediate execution, that the person to whom it is addressed is convinced of the imminence of his danger, and provided it is of such severity as to overcome his will, deprive him of his free choice, and constrain him to do an act against his will.<sup>112</sup> In respect to the kind of threats which may constitute duress, however, the modern doctrines show a great advance over the notions of the common law. In Blackstone's time, duress per minas was recognized only where the threat was of injury to life or limb. He says: "A fear of battery or being beaten, though never so well grounded, is not duress, neither is the fear of having one's house burned, or one's goods taken away and destroyed; because, in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages, but no suitable atonement can be made for the loss of life or limb."<sup>113</sup> It is remarked by the court in Minnesota that, "in examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoidance of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand, and with the great liberality of the equity rule on the other. At common law, duress meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or enable a party to recover back money paid. But

<sup>112</sup> *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205; *Russell v. McCarty*, 45 Ga. 197; *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129; *Kaus v. Gracey*, 162 Iowa, 671, 144 N. W. 625; *Liebau v. Miller*, 89 Kan. 697, 132 Pac. 173; *Bogle v. Hammons*, 2 Heisk. (Tenn.) 136. See, also, Civ. Code Cal., § 1570; Rev. Civ. Code Mont., § 4976; Rev. Civ. Code N. Dak., § 5291; Rev. Civ. Code S. Dak., § 1199; Rev. Laws Okl. 1910, § 901. And see *Dallavo v. Dallavo* (Mich.) 155 N. W. 538; *Plekenbrock v. Smith*, 43 Okl. 585, 143 Pac. 675.

<sup>113</sup> 1 Blackst. Comm. 131.

courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demands of another, will constitute duress, irrespective of the manifestation or apprehension of physical force.”<sup>114</sup> So, in another case, it is said: “The principle upon which men are relieved from their contracts procured by duress has been greatly extended in recent years. In the time of Lord Coke, no one would have been permitted to avoid his contract for duress unless the duress was such as not only to put him in fear of illegal imprisonment or great bodily harm, but went so far as to be something that a man of ordinary firmness would not be able to resist. No possible loss to his land or property would be sufficient to enable him to avoid a contract which he had made to prevent it. But gradually and by slow degrees the strictness of that rule was abated, until finally it has come to be the rule of law in this country, although perhaps not in England, that where one is presented with the contingency of serious loss or damage to his property or of a submission to an extortionate claim, if he pay the claim or make the contract which is extorted from him, it is not to be considered a voluntary act, and it may be set aside on the ground of duress.”<sup>115</sup> One of the federal courts has also observed: “In its more extended sense, duress may be said to be that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and

<sup>114</sup> *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581.

<sup>115</sup> *Van Dyke v. Wood*, 60 App. Div. 208, 70 N. Y. Supp. 324.

will of a person of ordinary firmness. Decided cases may be found which deny this rule, and hold that contracts procured by menace of a battery to the person, or of trespass on lands, or of loss of goods, cannot be avoided on that account. The reason assigned for thus restricting the general rule is that such threats are held not to be of a nature to overcome the will of a firm and prudent man, because, it is said, if such an injury is inflicted, adequate remedy may be had at law. But the modern decisions in this country hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract without the substance."<sup>116</sup>

Accordingly it is now well settled that where a contract, a note, or a conveyance is extorted from a party under a threat to kill him, to attack him with a deadly weapon, or otherwise to offer him violence or inflict physical injury upon him, if he refuses, and he is put in fear by the threat and by his belief in the ability and purpose of the other party to carry it into execution, and therefore yields to the unlawful demand, the instrument is voidable for duress.<sup>117</sup> Thus, for example, a marriage is not valid where the consent of the husband is not freely given but is coerced by the threat of the woman's father or other relative to kill, wound, or beat him unless he marries her.<sup>118</sup> So where a husband compels his wife to deed her property to him, or to join him in conveying it to a third person, by threats of personal violence, by abusive treatment, or by threats to separate her from her children, to drive her from home, or to refuse her support, it is executed under duress and may

<sup>116</sup> *Andrews v. Connolly* (U. C.) 145 Fed. 43.

<sup>117</sup> *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134; *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Reynolds v. Copeland*, 71 Ind. 422; *Mollere v. Harp*, 36 La. Ann. 471; *Couder v. Oteri*, 34 La. Ann. 694; *Goodrich v. Cushman*, 34 Neb. 460, 51 N. W. 1041; *Bueter v. Bueter*, 1 S. D. 94, 45 N. W. 208, 8 L. R. A. 562; *Owens v. Mynatt*, 1 Helsk. (Tenn.) 675; *Pride v. Baker* (Tenn. Ch. App.) 64 S. W. 329.

<sup>118</sup> *Fowler v. Fowler*, 131 La. 1088, 60 South. 694; *Quealy v. Waldron*, 126 La. 258, 52 South. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374.

be avoided.<sup>119</sup> But a threat of suicide made by a husband to his wife, to induce her to sign a note or deed, does not amount to duress, and cannot be set up as a defense to it or as a ground for its rescission. "Here the threats were made by the husband against his own life. The maker and the object of the threats were the same. Their execution was within his own power of volition. The wife knew that no harm could come to him except by his own act. The present case is utterly unlike an instance of the pressure of some overshadowing danger, uncontrollable by either the wife or the person endangered. There is no trace of a doctrine that the threat of a husband against himself will avoid the contract of his wife, or conversely, and such a rule would lead to an instability in that class of contracts which would be vicious."<sup>120</sup>

But the scope of duress by threats extends much beyond these limits. Injury to one's property or financial interests may be threatened in such a way as to constitute duress under the modern rules. Such is the case, for instance, with a threat to bring ruin upon a person's business,<sup>121</sup> or a threat to exert influence with the council of a city to prevent a contractor from being paid for paving one of the city streets,<sup>122</sup> or a threat by an employé to leave his employment before the expiration of its term, and to take with him certain funds which he had collected for his employers and also various contracts which he controlled and which were worth several thousand dollars,<sup>123</sup> or a threat by a person who is bound to keep certain property insured for the benefit of another, made after the property has been destroyed by fire, that he will destroy the insurance policies and omit

<sup>119</sup> *Fisk v. Stubbs*, 30 Ala. 335; *Kellogg v. Kellogg*, 21 Colo. 181, 40 Pac. 358; *Willetts v. Willetts*, 104 Ill. 122; *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136; *Vicknair v. Trosclair*, 45 La. Ann. 373, 12 South. 486; *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360) 88 Am. Dec. 76; *Graves v. Graves*, 255 Mo. 468, 164 S. W. 496; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623.

<sup>120</sup> *Wright v. Remington*, 41 N. J. Law, 48, 32 Am. Rep. 180; *Metropolitan Life Ins. Co. v. Meeker*, 85 N. Y. 614; *Girty v. Standard Oil Co.*, 1 App. Div. 224, 37 N. Y. Supp. 369.

<sup>121</sup> *Ring v. Ring*, 127 App. Div. 411, 111 N. Y. Supp. 713.

<sup>122</sup> *French v. Talbot Pav. Co.*, 100 Mich. 443, 59 N. W. 166.

<sup>123</sup> *Whitt v. Blount*, 124 Ga. 671, 53 S. E. 205.

to pay premiums, so as to prevent the collection of the insurance money,<sup>124</sup> and it seems that duress may be predicated of a threat by an attorney at law to disclose confidential communications of his client, with resultant injury to the latter.<sup>125</sup> So, where a company having the exclusive right to sell gas in a city refuses to supply a consumer, unless he will pay the amount remaining due to the company from a former owner of the premises, his promise to do so is voidable.<sup>126</sup> By statute in several states, a threat of injury to the reputation or good name of a person may constitute duress,<sup>127</sup> and this has also occasionally been ruled without the aid of a statute.<sup>128</sup> But it appears that a mere threat to injure one's credit is not such an injury to or deprivation of property as will amount to duress at law.<sup>129</sup>

A threat to withhold payment of a debt, to break a contract, to refuse the recognition of a legal right, or to do any other mere civil injury for which there is an immediate and adequate remedy at law, is not duress.<sup>130</sup> This principle is illustrated by a case in which the owner of certain barges had executed charter parties of them to the United States for a stipulated sum per month so long as they should be retained in the service of the government. After they had been used for some time, he was informed by the quartermaster general that he must execute a new charter party at a reduced rate of rental. He refused to do this, and demanded the return of the barges, which was refused, but when he learned that the quartermaster general intended to retain possession of them and to refuse all compensation, he executed the required charter party, stating that he

<sup>124</sup> *Moore v. Putts*, 110 Md. 490, 73 Atl. 149.

<sup>125</sup> *Dyrenforth v. Palmer Pneumatic Tire Co.*, 145 Ill. App. 62.

<sup>126</sup> *New Orleans Gas Light Co. v. Paulding*, 12 Rob. (La.) 378.

<sup>127</sup> Civ. Code Cal., § 1570; Rev. Civ. Code Mont., § 4976; Rev. Civ. Code N. Dak., § 5291; Rev. Civ. Code S. Dak., § 1199; Rev. Laws Okl. 1910, § 901.

<sup>128</sup> *McSween v. Miller*, 1 Helsk. (Tenn.) 104, note.

<sup>129</sup> *Bancroft v. Bancroft* (Cal.) 40 Pac. 488; *Coleman v. Merchants' Nat. Bank*, 6 Ohio Dec. 1063; *F. B. Collins Inv. Co. v. Easley*, 44 Okl. 429, 144 Pac. 1072.

<sup>130</sup> *Tucker v. State*, 72 Ind. 242; *Cable v. Foley*, 45 Minn. 421, 47 N. W. 1135; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Miller v. Miller*, 68 Pa. 486; *Simmons v. Sweeney*, 13 Cal. App. 283,

did so under protest and by reason of financial necessity. From time to time thereafter he accepted payment at the reduced rate for the use of the barges, without protest or objection, but finally brought suit against the United States for the difference between the original and reduced rate of payment, claiming that the last charter party was executed under duress. But it was held that he was not entitled to recover, because he had a full and complete remedy at law for the government's breach of its contract, and need not have made the new agreement at all.<sup>131</sup> For similar reasons, a threat by a lessor to eject a tenant unless he consents to pay a sum demanded under the guise of rent does not constitute duress, though the sum demanded is more than is due and though the tenant pays it under protest.<sup>132</sup> And a threat by a subcontractor to remove fixtures installed in a building in course of construction, unless paid money not due to him, is not duress such as to entitle the general contractor to recover back the payment induced thereby.<sup>133</sup> So, the fact that a first mortgagee was induced to agree to pay a second mortgage by threats of the mortgagor to either convey or lease the land, which the latter had a right to do, does not constitute duress or fraud.<sup>134</sup> Nor can a plea of duress be supported by showing a threat of an administrator to resign and have another administrator appointed, though great expense to the estate would ensue.<sup>135</sup> And duress arising from threats of destruction of a vessel and cargo belonging to a neutral, captured by a belligerent in time of war, cannot be admitted to avoid a contract of ransom, where the capture was justified by proper cause, and still less where condemnation must have ensued in the regular prize proceedings.<sup>136</sup>

To constitute duress by threats, they must presage some

109 Pac. 265; *Electric Plaster Co. v. Blue Rapids City Tp.*, 77 Kan. 580, 96 Pac. 68.

<sup>131</sup> *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987.

<sup>132</sup> *Emmons v. Scudder*, 115 Mass. 367.

<sup>133</sup> *James C. McGuire & Co. v. H. G. Vogel Co.*, 164 App. Div. 173, 149 N. Y. Supp. 756.

<sup>134</sup> *Goos v. Goos*, 57 Neb. 294, 77 N. W. 687.

<sup>135</sup> *Sackman v. Campbell*, 15 Wash. 57, 45 Pac. 895.

<sup>136</sup> *Maisonnaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8,978.



specific and particular injury or disaster presently to be inflicted upon the person threatened. Vague menaces of harm, or assertions of indefinite future trouble, cannot be supposed to influence, much less to control, the mind and will of any reasonable being. And further, however specific the threats may be, they cannot be called duress unless they awaken a real and not unreasonable apprehension in the mind of the person acted on. Hence they must be accompanied by at least the apparent power to inflict the injury threatened. Whether or not that power exists, they must at least excite a reasonable belief that the person who threatens has at hand the means of carrying his threats into present execution.<sup>137</sup> "There must be some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment."<sup>138</sup> A mere display of anger, or the use of violent and profane language, indefinitely minatory in its character, will not constitute such duress as will relieve a party from a contract into which he has entered under its influence.<sup>139</sup> Thus, it is said in a case in New Jersey that mere angry words and looks by a paralytic husband cannot amount to coercion of his wife, on account of his absolute physical inability to do any injury or make good any threats.<sup>140</sup> And finally, to make the defense of duress effective, it must have been so great as to take away the voluntary power of action and consent on the part of the person threatened. However much he may have been disquieted or even alarmed by the threats, a perturbed or apprehensive state of mind is not enough to invalidate his action, but the fear of injury must have been so great as entirely to deprive him of a free choice in the matter.<sup>141</sup>

<sup>137</sup> *Barrett v. Mahnken*, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953; *Boggess v. Chesapeake & O. R. Co.*, 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777; *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323; *Vick v. Shinn*, 49 Ark. 70, 4 S. W. 60, 4 Am. St. Rep. 26; *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176.

<sup>138</sup> *Radich v. Hutchins*, 95 U. S. 210, 24 L. Ed. 409.

<sup>139</sup> *Adams v. Stringer*, 78 Ind. 175.

<sup>140</sup> *Van Deventer v. Van Deventer*, 46 N. J. Law, 460.

<sup>141</sup> *Iowa Sav. Bank v. Frink*, 1 Neb. (Unof.) 14, 92 N. W. 916.

§ 232. **Instituting or Threatening Civil Suits or Foreclosures.**—It is not unlawful to threaten to do that which one has a perfect legal right to do. Hence duress cannot be predicated upon a threat to institute a suit at law, to issue execution on a judgment, to attach property, to foreclose a lien, or to resort to any other of the ordinary legal remedies, provided there is no abuse of legal process, such as would be involved in the assertion of an entirely groundless claim; and this is true although the execution of the threat would entail special hardship upon the person threatened, or though it is made at a time and under circumstances such as to make it specially injurious to his interests, and though it is only used as a means of forcing a settlement of a dispute.<sup>142</sup> And a threat to bring suit does not constitute duress merely because it will subject the party to costs in case he is defeated,<sup>143</sup> or though it is accompanied by a threat that the party to be sued will thereby be “ruined with costs,”<sup>144</sup> or though the suit threatened is of such a character that the arrest of the defendant will be a possible and probable incident of it.<sup>145</sup> So, it is not unlaw-

<sup>142</sup> *Morton v. Morris*, 72 Fed. 392, 18 C. C. A. 611; *Atkinson v. Allen*, 71 Fed. 58, 17 C. C. A. 570; *Davis v. Rice*, 88 Ala. 388, 6 South. 751; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Miller v. Davis' Estate*, 52 Colo. 485, 122 Pac. 793; *Perryman v. Pope*, 94 Ga. 672, 21 S. E. 715; *Snyder v. Braden*, 58 Ind. 143; *Peckham v. Hendren*, 76 Ind. 47; *Wilson Sewing Mach. Co. v. Curry*, 126 Ind. 161, 25 N. E. 896; *Quigley v. Quigley (Iowa)* 115 N. W. 1112; *United States Banking Co. v. Veale*, 84 Kan. 385, 114 Pac. 229, 37 L. R. A. (N. S.) 540; *Kiler v. Wohletz*, 79 Kan. 716, 101 Pac. 474, L. R. A. 1915B, 11; *Ripy Bros. Distilling Co. v. Lillard*, 149 Ky. 726, 149 S. W. 1009; *New Orleans & N. E. R. Co. v. Louisiana Const. & Imp. Co.*, 109 La. 13, 33 South. 51, 94 Am. St. Rep. 395; *Foster v. Clark*, 19 Pick. (Mass.) 329; *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. 115; *Jones v. Houghton*, 61 N. H. 51; *Evans v. Gale*, 18 N. H. 397; *Scudder v. Burrows*, 7 N. Y. St. Rep. 605; *Abelman v. Indelli & Conforti Co.*, 170 App. Div. 740, 156 N. Y. Supp. 401; *Hunt v. Bass*, 17 N. C. 292, 24 Am. Dec. 274; *Gunter v. Thomas*, 36 N. C. 199; *Wells v. Barnett*, 7 Tex. 584; *Walla Walla Fire Ins. Co. v. Spencer*, 52 Wash. 369, 100 Pac. 741; *Cornwall v. Anderson*, 85 Wash. 369, 148 Pac. 1; *York v. Hinkle*, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73.

<sup>143</sup> *Falvey v. Hennepin County Com'rs*, 76 Minn. 257, 79 N. W. 302.

<sup>144</sup> *Whittaker v. Southwest Virginia Imp. Co.*, 34 W. Va. 217, 12 S. E. 507.

<sup>145</sup> *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76.

ful for a creditor to demand and secure from his debtor a promissory note for a bona fide debt, under a threat of suit if such note is not given, and a note so given cannot be avoided.<sup>146</sup> And an adult's promise to pay a debt contracted during his infancy, though made in response to a threat of suit, is not given under duress.<sup>147</sup> Again, a contract under seal by which persons who had constructed a dam across a stream without legislative authority, to protect their crops from floods, agreed to the removal of the dam in consideration of its being allowed to remain until the end of the season, cannot be held to have been without consideration or made under duress, where the other parties, who claimed the dam to be unlawful, made no threats except to institute legal proceedings.<sup>148</sup> So, a family arrangement for the settlement of an estate cannot be avoided on the ground of duress though it was obtained by the strong insistence of one of the parties, where he made no threat against the others, except that, if they did not accede, he would proceed to administer the estate in the probate court and that, in that case, they would get only what the law allowed them, or that he would "see that they got nothing."<sup>149</sup> For the same reason, a threat to attach property or to levy an execution upon it does not constitute duress.<sup>150</sup> And in a case where the plaintiff, believing that the copyright on certain of his plays was being infringed by the defendants, threatened to restrain their production of such a play unless they would pay him a royalty on it, it

<sup>146</sup> *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502.

<sup>147</sup> *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

<sup>148</sup> *Manigault v. S. M. Ward & Co.* (C. C.) 123 Fed. 707.

<sup>149</sup> *Burnes v. Burnes* (C. C.) 132 Fed. 485.

<sup>150</sup> *Lehman v. Shackelford*, 50 Ala. 437; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *Bolln v. Metcalf*, 6 Wyo. 1, 42 Pac. 12, 44 Pac. 694, 71 Am. St. Rep. 898. Threats of attaching a tenant's crop for the payment of rent, made by a person who has entered for the purpose of collecting or securing the rent before it is due, and who is accompanied by a constable, but who has no legal process, do not constitute duress. *Lehman v. Shackelford*, 50 Ala. 437. Where a party is about to be turned out of possession of premises on a writ of *habere facias possessionem*, a lease signed under an alternative of so doing or a refusal to suspend the execution cannot be said to have been procured by fraud or duress. *Pottsville Bank v. Cake*, 12 Pa. Super. Ct. 61.

was held that defendants' contract to pay the royalty demanded, in consideration that the plaintiff would not sue them, was not invalid for duress.<sup>151</sup> Even a threat to throw a debtor into bankruptcy, as a means of securing the payment of a just debt, is not duress.<sup>152</sup> But many cases stand on the border line, particularly where the threat of suit, lawful in itself, is accompanied by threats of other action which would be unlawful. Thus one who has purchased stock which proves to be without value, and has obtained from the seller an agreement to take it back and restore his money, clearly has a right to threaten suit as a means of enforcing the agreement. But if he at the same time threatens to tell third persons, with whom the seller is then negotiating for the purchase of like stock, of its want of value and of the breach of the seller's agreement, it may be a question whether he has not overstepped his legal rights. This question arose in a case in New York, and it was held that, as it did not clearly appear that the threats made were not such as the person had a right to make, it could not be said that the settlement was forced by duress.<sup>153</sup> A somewhat similar case would arise in the event that an attorney at law should compel the settlement of a disputed claim on terms favorable to himself by threatening suit, and also by the further threat that such a suit would involve the disclosure of confidential communications made to him, which the client would be unwilling to have made public.<sup>154</sup>

But one who, to gain an unjust advantage, threatens to bring a suit for which no grounds exist in law, is not entitled to the favorable consideration of a court of equity; and notwithstanding the general rules above stated, there are some cases in which the courts have held that a threat of this kind may constitute duress. The elements considered are, first, that the party has no legal right to the benefit or payment which he thus seeks to coerce the other into

<sup>151</sup> *Hart v. Walsh*, 84 Misc. Rep. 421, 146 N. Y. Supp. 235.

<sup>152</sup> *Barnes v. Stevens*, 62 Ind. 226. But the payment of the debt under such circumstances, even under the urgency of the creditor, would constitute an unlawful preference, on which a petition in bankruptcy might be founded. See Black, *Bankruptcy*, § 602.

<sup>153</sup> *McCammon v. Shantz*, 26 Misc. Rep. 476, 57 N. Y. Supp. 515.

<sup>154</sup> *Dyrenforth v. Palmer Pneumatic Tyre Co.*, 240 Ill. 25, 88 N. E. 290.

granting; second, that the threatened proceedings would cause some special trouble or embarrassment to the person threatened; and third, that the threat was actually effective in compelling him to do what was demanded of him. Thus, a threat to institute receivership proceedings has been held equivalent to duress in a case where there was no legal ground for such a suit, where the payment extorted by means of it was not justly due, and where the institution of the suit would have been ruinous to the credit of the party threatened and of the corporation which he was supporting.<sup>155</sup> So where a person, absent from home at the time, is sued on a contract made by a firm, on the allegation that he is a member of it, when in fact he is not, as the plaintiff well knows, and gives a note for the amount to gain time and avoid the suit, it is given under duress.<sup>156</sup> And the same rule has been applied in cases where the threat was to file and enforce a mechanic's lien on a house, where nothing for which a lien could be claimed was due from the owner of the premises, but he was deceived into supposing that the claim might be effective.<sup>157</sup> And in any event, it seems reasonable to confine the general rule to cases where the prosecution threatened is one of the ordinary and usual methods of seeking redress in the courts. A threat to put a person under guardianship as a lunatic or a spendthrift, or to begin proceedings to have him declared mentally incompetent, is of a different nature altogether. On account of the publicity, mortification, and anxiety attending such a proceeding, it is very probable that the threat of it would constitute a very effective kind of duress, when applied to the kind of person against whom it might plausibly be employed, that is to say, an aged and infirm person or one of weak will and unregulated impulses. And the courts have not hesitated to set aside contracts and conveyances thus extorted from such persons.<sup>158</sup>

<sup>155</sup> *Rose v. Owen*, 42 Ind. App. 137, 85 N. E. 129.

<sup>156</sup> *Mulholland v. Bartlett*, 74 Ill. 58.

<sup>157</sup> *Ward v. Baker* (Tex. Civ. App.) 135 S. W. 620; *Gates v. Dundon* (City Ct.) 18 N. Y. Supp. 149.

<sup>158</sup> *Footte v. De Poy*, 126 Iowa, 366, 102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365; *Hogan v. Leeper*, 37 Okl. 655, 133 Pac. 190, 47 L. R. A. (N. S.) 475; *Gill's Trustee v. Gill* (Ky.) 124 S. W. 875.

When one person holds a valid mortgage on the land or chattels of another, which is past due, there is nothing unlawful in his threatening to foreclose it, and if he employs such a threat as a means of compelling the mortgagor to pay what is claimed to be due, or to give a new mortgage, to renew overdue paper, to sell a part of the land at a price offered, or to do any other act not unlawful in itself, there is no legal duress in the transaction.<sup>159</sup>

§ 233. **Duress of Imprisonment.**—The mere fact that a person is under arrest and in prison at the time he makes a payment or signs a note, bond, or deed, even though such instrument relates to the subject in respect to which he is prosecuted, is not enough to show that his act was procured by duress. A man may retain his freedom of will and of choice in a business matter, though his body is under restraint. The law does not recognize any inevitable inference of coercion from the sole fact of imprisonment.<sup>160</sup> To constitute duress of imprisonment, it must be shown that there was a restraint of the person under (1) an arrest for an improper purpose without just cause; or (2) an arrest for a just cause but without lawful authority; or (3) an arrest for a just cause but for an unlawful purpose such as to constitute an abuse of process, though under a lawful writ; or (4) that unnecessary harshness and oppression was practised upon the prisoner or that he was tortiously detained after being entitled to his liberty.<sup>161</sup> A legal arrest,

<sup>159</sup> *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629; *Stout v. Judd*, 10 Kan. App. 579, 63 Pac. 662; *Nutting v. McCutcheon*, 5 Minn. 382 (Gil. 310); *Martin v. New Rochelle Water Co.*, 11 App. Div. 177, 42 N. Y. Supp. 893; *F. B. Collins Inv. Co. v. Easley*, 44 Okl. 429, 144 Pac. 1072; *Pease v. Francis*, 25 R. I. 226, 55 Atl. 686; *Shuck v. Interstate B. & L. Ass'n*, 63 S. C. 134, 41 S. E. 28; *Ward v. Baker* (Tex. Civ. App.) 135 S. W. 620; *Drew v. Bouffleur*, 69 Wash. 610, 125 Pac. 947.

<sup>160</sup> *Heaps v. Dunham*, 95 Ill. 583; *Feller v. Green*, 26 Mich. 70.

<sup>161</sup> *Brown v. Pierce*, 7 Wall. 205, 19 L. Ed. 134; *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *Fillman v. Ryon*, 168 Pa. 484, 32 Atl. 89; *Morrill v. Nightingale*, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; *Meacham v. Town of Newport*, 70 Vt. 67, 39 Atl. 631; *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1102; *Phelps v. Zuschlag*, 34 Tex. 371; *Soule v. Bonney*, 37 Me. 128; *Bates v. Butler*, 46 Me. 387; *Shaw v. Spooner*, 9 N. H. 197, 32 Am. Dec. 348; *Stouffer v. Latshaw*, 2 Watts (Pa.) 165, 27 Am. Dec. 297; *Harrison Tp. v. Addison*,

for a lawful purpose and on just cause, not accompanied by any severity or impropriety of manner, is not such duress as will avoid a contract or conveyance.<sup>162</sup> As remarked by the court in Massachusetts in an early case, duress by imprisonment is where one is restrained of his liberty by an unlawful imprisonment or by a tortious detention thereafter. "If therefore a man, supposing that he has a cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action. And although the imprisonment be lawful, yet, unless the deed be made freely and voluntarily, it may be avoided by duress. And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully by covin with the jailer, this is a duress which will avoid the deed. It is a sound and correct principle of law that when a man shall falsely, maliciously, and without probable cause sue out a process in form regular and legal to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment."<sup>163</sup>

To apply these principles, it has been held that an arrest made in Canada, for a debt justly due from the debtor arrested, may constitute duress if it was made regular and lawful in form only by the perjury of the creditor by whom it was procured.<sup>164</sup> And so, if one is in jail under a charge of murder, and another threatens to detain him in prison for an indefinite period and prevent a trial from taking place, this will amount to duress by threat of an unlawful imprisonment.<sup>165</sup> So, where a young man was arrested on

176 Ind. 389, 96 N. E. 146. A person unlawfully imprisoned, who is induced by his prosecutor to agree not to sue for damages, to obtain his liberty, is not bound by the agreement. *Lyons v. Davy-Pocahontas Coal Co.* (W. Va.) 84 S. E. 744.

<sup>162</sup> *Nealley v. Greenough*, 25 N. H. 325.

<sup>163</sup> *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170.

<sup>164</sup> *Strong v. Grannis*, 26 Barb. (N. Y.) 122.

<sup>165</sup> *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153.



a charge of bastardy which was false, and in order to procure his release consented to marry the prosecuting witness, it was held that such marriage was void.<sup>166</sup> But on the other hand, where a man is arrested on a charge of bastardy or of seduction under promise of marriage, which is true, the mere fact that he is in prison when he signs a promise to marry the woman, to provide for the child, or otherwise to settle the case, does not show that it was procured by duress.<sup>167</sup>

The employment of criminal process to obtain civil redress, and particularly when used as a means of oppression and to extort disadvantageous terms from a party in custody or more than the law allows to be demanded of him, is a misuse of process and a fraud upon the law. And so, although a person is arrested under a legal warrant and by a proper officer, yet if the object of the arrest is to extort money or force the settlement of a mere civil claim, it is a case of false imprisonment, and any release, conveyance, or security procured under the pressure of such a proceeding by the party promoting it is voidable on account of duress.<sup>168</sup> Thus, the commencement of a suit for malicious prosecution, and the arrest of the defendant therein, to coerce a settlement, is an abuse of process which will vitiate the settlement so induced, if the duress was reasonably adequate to overcome the will of the defendant, although the process itself was legal.<sup>169</sup> In another case, it appeared that a debtor had arranged a composition with his creditors, but one of them demanded a note and mortgage to secure his debt over and above the amount agreed upon for the general composition. These securities were given, but they were of course void for want of consideration. After the composition had been effected, the creditor demanded of

<sup>166</sup> *Shoro v. Shoro*, 60 Vt. 268, 14 Atl. 177, 6 Am. St. Rep. 118.

<sup>167</sup> *Jones v. Peterson*, 117 Ga. 58, 43 S. E. 417; *McCarthy v. Taniska*, 84 Conn. 377, 80 Atl. 84.

<sup>168</sup> *Hackett v. King*, 6 Allen (Mass.) 58; *Seiber v. Price*, 26 Mich. 518; *Miller v. Bryden*, 34 Mo. App. 602; *Phelps v. Zuschlag*, 34 Tex. 371; *Stebbins v. Niles*, 25 Miss. 267; *Kavanagh v. Saunders*, 8 Me. (8 Greenl.) 422; *Holmes v. Hill*, 19 Mo. 159; *Coveney v. Pattullo*, 130 Mich. 275, 89 N. W. 968.

<sup>169</sup> *Behl v. Schuett*, 104 Wis. 76, 80 N. W. 73.

the debtor a re-execution of the note and mortgage, but the debtor, getting the originals into his possession, destroyed them. He was then arrested upon a charge of larceny, and in order to secure his release, gave a new note and mortgage. It was held that they were void, not only for want of consideration, but also because secured by duress.<sup>170</sup>

On the other hand, though a man is under arrest, it is not duress in law to take advantage of this fact to force a settlement, where that which is demanded and received from him is no more than he is fairly and justly liable for. Where a party is in good faith pursuing legal remedies for the redress of private injuries or protection from public wrongs, and the other assents to a just satisfaction in consideration of a release, this cannot be availed of as duress to avoid his act.<sup>171</sup> Thus, where the defendant embezzled the plaintiff's funds, and executed a note in settlement, the plaintiff will be entitled to recover thereon, to the amount embezzled, though the note was executed by the defendant when under arrest.<sup>172</sup> So a deed for which full value is given is not necessarily void because the grantor was in jail at the suit of the grantee and was threatened with being kept there indefinitely unless he would sign the deed.<sup>173</sup> And where a person who is under arrest and in prison on a criminal charge asks another to become his bail, and in consideration thereof conveys property to him, there being no proof of fraud or oppression, it is not a case of duress, the grantee not having instigated the arrest or procured the imprisonment, and there being nothing unlawful in the imprisonment itself.<sup>174</sup>

**§ 234. Threats of Arrest or Criminal Prosecution.—**Where a person has committed a crime, a threat to have him arrested and imprisoned will not constitute duress, for it is no more than a statement of intention as to what the party has a lawful right to do, and hence it cannot be pleaded to

<sup>170</sup> *Wheeler v. Pettyjohn*, 14 Okl. 71, 76 Pac. 117.

<sup>171</sup> *Taylor v. Cottrell*, 16 Ill. 93; *Grimes v. Briggs*, 110 Mass. 446; *Taylor v. Blake*, 11 Minn. 255 (Gil. 170); *Holmes v. Hill*, 19 Mo. 159.

<sup>172</sup> *Largent v. Beard* (Tex. Civ. App.) 53 S. W. 90.

<sup>173</sup> *Mitchell v. Lidgerwood*, 50 Wash. 290, 97 Pac. 61.

<sup>174</sup> *Knobb v. Lindsay*, 5 Ohio, 468.

discharge him from liability on a contract, conveyance, or security given to indemnify the person injured by the crime, provided there are no circumstances of fraud or oppression in the case and no offer or attempt to use the process for an unlawful purpose.<sup>175</sup> This is the rule established by the general current of the authorities. But there are some decisions maintaining the principle that the only proper subject of inquiry is the effect of a threat upon the will and choice of the party, and that if he was actually coerced into doing something he was unwilling to do, by a threat of criminal prosecution, it constitutes duress, even though he was guilty of the crime alleged.<sup>176</sup> And it may be conceded, at any rate, that the threat of prosecution should not be countenanced, even in the case of a guilty person, when used as a means of oppression or extortion, that is, for the purpose of obtaining from him more than is due by way of indemnity or compensation.<sup>177</sup>

But on the other hand, to threaten a person with arrest and prosecution for a crime which he has not committed is to threaten him with a false accusation and an unlawful imprisonment, and this constitutes duress just as much as would the actual arrest and imprisonment, provided that it really intimidates the person threatened and overcomes his will and freedom of choice; and any consideration given by him under the pressure of such a threat, and in order to escape from it, is voidable for duress.<sup>178</sup> Thus, a receipt for

<sup>175</sup> *Gregor v. Hyde*, 62 Fed. 107, 10 C. C. A. 290; *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; *Compton v. Bunker Hill Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261; *Thorn v. Pinkham*, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; *Davis v. Luster*, 64 Mo. 43; *McCormick Harvesting Mach. Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80; *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169; *Edwards v. Boyle*, 37 Okl. 639, 133 Pac. 233; *Guinn v. Sumpter Valley Ry. Co.*, 63 Or. 368, 127 Pac. 987; *Fountain v. Bigham*, 235 Pa. 35, 84 Atl. 131, Ann. Cas. 1913D, 1185. And see *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771.

<sup>176</sup> *Wilson v. Calhoun* (Iowa) 151 N. W. 1087; *Wilbur v. Blanchard*, 22 Idaho, 517, 126 Pac. 1069; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912. And see *Greenwell v. Negley*, 31 Ky. Law Rep. 144, 101 S. W. 961.

<sup>177</sup> *Briggs v. Withey*, 24 Mich. 136.

<sup>178</sup> *Fieg v. Gjurich*, 163 Cal. 740, 127 Pac. 49; *Kronmeyer v. Buck*, 258 Ill. 586, 101 N. E. 935, 45 L. R. A. (N. S.) 1182; *Bush v. Brown*,

wages due given by plaintiff to defendant, when threatened by the latter with prosecution for embezzlement, of which he was innocent, and without any payment by the defendant, is void for duress.<sup>179</sup> And a threat of imprisonment for an offense of which the person threatened is innocent is, as to him, a threat of unlawful imprisonment, even though the person making the threat believed that he was guilty.<sup>180</sup>

But it should be remembered that it is not, strictly speaking, the threat of criminal prosecution in any case which constitutes duress, but the condition of mind produced thereby. Hence the threat must be of such a nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in that condition.<sup>181</sup> A threat of arrest and imprisonment, not followed up by any attempt to put the threat into execution, is not duress,<sup>182</sup> and a mere threat to prosecute at some indefinite time in the future would not be duress, particularly if the threatened person knew that the other had no present means of executing it by arresting him, and also if he knew that he had a defense and could make it.<sup>183</sup> In fact the rule has been broadly stated that threats of criminal prosecution do not constitute duress such as to invalidate a deed or other instrument, where no warrant has been issued and no proceedings actually commenced,<sup>184</sup> and while perhaps an as-

49 Ind. 573, 19 Am. Rep. 695; *Kennedy v. Roberts*, 105 Iowa, 521, 75 N. W. 363; *Brant v. Brant*, 115 Iowa, 701, 87 N. W. 406; *Gard v. Arnold*, 157 Mo. 538, 57 S. W. 1035; *Springfield Fire & Marine Ins. Co. v. Hull*, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; *James v. Roberts*, 18 Ohio, 548; *Landa v. Obert*, 5 Tex. Civ. App. 620, 25 S. W. 342. Compare *Huston v. Smith*, 248 Ill. 396, 94 N. E. 63.

<sup>179</sup> *Maricle v. Brooks*, 51 Hun, 638, 5 N. Y. Supp. 210; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297.

<sup>180</sup> *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21.

<sup>181</sup> *Wolff v. Bluhm*, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115; *Wilkerson v. Hood*, 65 Mo. App. 491; *Thorne v. Farrar*, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. Rep. 995.

<sup>182</sup> *Simmons v. Mann*, 92 N. C. 12.

<sup>183</sup> *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321.

<sup>184</sup> *Huston v. Smith*, 248 Ill. 396, 94 N. E. 63; *Higgins v. Brown*, 78 Me. 473, 5 Atl. 269; *Ingebrigt v. Seattle Taxicab & Transfer Co.*, 78 Wash. 433, 139 Pac. 188.

sertion that a warrant was outstanding or that the prosecution had been begun, false in fact but believed by the threatened party, might be held to fulfill this condition, yet a mere menace or promise of future prosecution, not accompanied by any such statement, and with nothing to show that the person was in imminent and immediate danger of arrest, would certainly not be sufficient.<sup>185</sup> Thus, in a case in Pennsylvania, friends of a debtor who had obtained goods by false representations were informed that creditors in a foreign state were threatening to resort to criminal proceedings if they were not secured, and the friends informed the debtor of this threat, and advised him to assign certain claims to those creditors, which he did, but it was held that such assignment was not void as being made under duress, because, as the court pointed out, there was no arrest or imprisonment, no process for his arrest issued, no prosecution for any criminal offense instituted, no officer of the law ready to make an arrest, and no threats made directly by any person to the party affected.<sup>186</sup> So, a note given to an agent by his principal, in settlement of the agent's claims, is not void as obtained by duress, though the agent threatened that if the note was not executed he would give information to the district attorney which would aid in a pending prosecution against the principal.<sup>187</sup> But a threat of arrest made by a person representing himself to be an officer of justice and exhibiting a paper purporting to be a warrant constitutes duress, where the party threatened is actually intimidated by it, the purpose being merely to force payment of a debt.<sup>188</sup> And a warrant addressed to an officer of another county or district than that in which the court has jurisdiction is not lawful process, so that an arrest made under it is illegal and constitutes duress with reference to any contract or payment extorted from the debtor by means of it.<sup>189</sup>

Some of the foregoing cases show that the threat need not be made to the victim directly by the person who is to

<sup>185</sup> *Buchanan v. Sahlein*, 9 Mo. App. 552.

<sup>186</sup> *Phillips v. Henry*, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706.

<sup>187</sup> *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281.

<sup>188</sup> *Coffelt v. Wise*, 62 Ind. 451.

<sup>189</sup> *Tilley v. Damon*, 11 Cush. (Mass.) 247.

benefit by the deed or contract to be extorted from him, but it is sufficient if it is made by an officer at the instigation of such person. There are also a few cases in which the actual threat was made by the judge of the court in which the threatened prosecution would be tried, as where, by the procurement of one person, he sends word to another that, unless he complies with the former's demand upon him, he will be sent to prison. The pressure exerted by such a threat has been held to be duress invalidating the resultant transaction.<sup>190</sup>

**§ 235. Prosecution of Husband, Wife, or Relatives.—**Duress may be practised upon a person by threats of a criminal prosecution against the husband or wife of such person, or against a near relative, such as a parent or child, and if the dread, anxiety, and fear of disgrace excited by such threats are so potent as to overcome the free will and choice of the person affected, such duress may be pleaded to invalidate any contract, conveyance, or security extorted from him by means of it.<sup>191</sup> Still more, of course, the actual arrest and imprisonment of a husband, wife, parent, or child is duress when used as a means of coercing a relative into making a contract, giving a deed or security, or agreeing to a settlement.<sup>192</sup> This subject is dealt with in the codes of

<sup>190</sup> *Harshaw v. Dobson*, 64 N. C. 384. And see *Bogle v. Hammons*, 2 Helsk. (Tenn.) 136.

<sup>191</sup> *Embry v. Adams* (Ala.) 68 South. 20, L. R. A. 1915D, 1118; *Martin v. Evans*, 163 Ala. 657, 50 South. 997; *Sharon v. Gager*, 46 Conn. 189; *Merchant v. Cook*, 21 D. C. (10 Mackey) 145; *Mayer v. Oldham*, 32 Ill. App. 233; *Heaton v. Norton County State Bank*, 59 Kan. 281, 52 Pac. 876; *Welser v. Welch*, 112 Mich. 134, 70 N. W. 438; *Lewis v. Doyle*, 182 Mich. 141, 148 N. W. 407; *Leflore County v. Allen*, 80 Miss. 298, 31 South. 815; *Ryan v. Strop*, 253 Mo. 1, 161 S. W. 700; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; *Stowell v. American Co-Operative Relief Ass'n*, 52 Hun, 613, 5 N. Y. Supp. 233; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070; *Goringe v. Reed*, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; *Hinsdill v. White*, 34 Vt. 558; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880.

<sup>192</sup> *Bailey v. Devine*, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; *Blanchi v. Leon*, 63 Misc. Rep. 73, 118 N. Y. Supp. 386. See, per contra, *Simms v. Barefoot's Ex'rs*, 3 N. C. 402.

some of the states, by providing that duress shall consist in the actual or threatened confinement either of the person coerced "or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife," provided that the confinement is either unlawful or if lawful in form, was "fraudulently obtained or fraudulently made unjustly harassing or oppressive."<sup>193</sup>

Whether this rule should be extended to other relationships, not so close as that of husband and wife or parent and child, is not very clear. But it may be stated with some confidence that the general tendency is to lay less stress upon the degree of kinship between the parties affected, and more upon the actual effect of the threats made in exciting alarm, anxiety, and distress in the mind of the person victimized. It should be remembered that the rule of the common law was that duress was a strictly personal plea, which could be advanced only by the person upon whom it was practised, that is, against whom the threats were directed. An exception to this rule was allowed in the case of husband and wife, but chiefly on the ground that they were regarded in law as one person. A further exception in the case of parent and child can be traced far back in the common law, but it was always admitted with considerable hesitation. But it is both the function and the tendency of equity to liberalize the common law and to extend the beneficial features of it according to their spirit rather than to adhere narrowly to the letter of the law. On the present question, therefore, the exact degree of relationship would appear to be a matter of secondary importance. The purpose of the rule would be satisfied if there were shown a habit of dependence and reliance on the one side and of help and protection on the other, and the existence of an affection so strong as to prompt the one person to make almost any sacrifice to save the other from pain and shame. Besides, family pride must be taken into account, and also the common feeling that one loses some portion of his own prestige when a kinsman is disgraced. And if the anxiety

<sup>193</sup> Civ. Code Cal., §§ 1569, 1570; Rev. Civ. Code Mont., §§ 4975, 4976; Rev. Civ. Code N. Dak., §§ 5290, 5291; Rev. Civ. Code S. Dak., §§ 1198, 1199; Rev. Laws Okl. 1910, §§ 900, 901.



and dread resulting from all these considerations, when a relative is threatened with criminal prosecution, do actually break down the resistance and overcome the will of the person practised upon, the precise degree of relationship between them would seem to be of very little importance. So far as the few extant authorities go, they support these views. Some of them speak in general terms of allowing the defense of duress in case of a prosecution threatened against a husband, wife, child, "or other near relative."<sup>194</sup> The statutory provisions in some of the states (quoted in the preceding paragraph) extend the defense of duress to the case of such threats made against the husband or wife of the party coerced or an "ancestor, descendant, or adopted child of such party or of his or her wife or husband," which would include the case of grandparents and grandchildren, and of step-sons and daughters, as well as of adoptive children. Also there is a case in Connecticut in which a mortgage was held invalid on account of duress, where the mortgagor (an unmarried woman of advanced age) was practised upon by threats of a criminal prosecution against her nephew.<sup>195</sup>

In cases of this kind, the question whether the person against whom the prosecution was threatened was guilty or innocent of the alleged crime is immaterial as bearing on the matter of duress.<sup>196</sup> On the one hand, though the threat is of a lawful prosecution for a crime actually committed, and though the deed or security given is in settlement of a just debt, it is none the less duress to extort it by playing upon the fears and the affections of a relative.<sup>197</sup> As pointed out by the court in New Jersey, it is against equity for a creditor to extort from a parent payment of or

<sup>194</sup> *International Harvester Co. v. Voborll*, 187 Fed. 973, 110 C. C. A. 311.

<sup>195</sup> *Sharon v. Gager*, 46 Conn. 189.

<sup>196</sup> *Heaton v. Norton County State Bank*, 59 Kan. 281, 52 Pac. 876; *Williamson-Halsell-Frazier Co. v. Ackerman*, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484.

<sup>197</sup> *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21; *Heaton v. Norton County State Bank*, 5 Kan. App. 498, 47 Pac. 576; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912. But see *Blanchi v. Leon*, 138 App. Div. 215, 122 N. Y. Supp. 1004.

security for the debt of a son, for which the parent is not responsible, by threats of prosecuting the son criminally, though an imprisonment of the son thereunder would be lawful, and contracts of the parent for such payment or security, executed under circumstances created by the creditor which deprive the parent of the freedom and power of deliberation necessary to validate transactions, may be avoided in equity as made without consent.<sup>198</sup> On the other hand, although no crime has been in fact committed and no prosecution begun, but the charge is wholly false, yet if the contracting party has been so impressed with a sense of imminent danger arising out of the threat and so put in fear as to be deprived of the free will power essential to contractual capacity, the resulting deed, contract, or security may be avoided for duress.<sup>199</sup> But the existence of these conditions must be clearly shown, and a transfer of property should not be set aside merely because the defendant threatened to arrest the plaintiff's son, where it is not shown that the plaintiff (a man in the prime of life and not incapacitated in any way) was not a man of ordinary firmness, and on the other hand it appears that the son was present at the time and protested that he was not liable to arrest.<sup>200</sup> But where the ground alleged for setting aside a deed is not so much duress of the grantor as that it was executed in pursuance of an agreement to stifle a criminal prosecution against his son, it must be averred and proved that the son had committed a crime.<sup>201</sup>

If a wife knows that her husband has committed a crime, and, although no threat of prosecuting him has yet been made, she voluntarily and deliberately executes a deed or a transfer of property in order to secure the silence of those injured by his crime, and from a conviction that such a course is necessary to save the family from disgrace, there

<sup>198</sup> *Ball v. Ward*, 76 N. J. Eq. 8, 74 Atl. 158.

<sup>199</sup> *International Harvester Co. v. Voboril*, 187 Fed. 973, 110 C. C. A. 311; *Ball v. Ball*, 79 N. J. Eq. 170, 81 Atl. 724, 37 L. R. A. (N. S.) 539; *Treadwell v. Torbert*, 122 Ala. 297, 25 South. 216; *Clement v. Buckley Mercantile Co.*, 172 Mich. 243, 137 N. W. 657.

<sup>200</sup> *Sulzner v. Cappeau, Lemley & Miller Co.*, 238 Pa. 547, 86 Atl. 480.

<sup>201</sup> *Ball v. Ward*, 76 N. J. Eq. 8, 74 Atl. 158.

is no duress and equity will not disturb the transaction.<sup>202</sup> And in the case of threatened proceedings against a relative, as well as in the case of threats against oneself, the plea of duress is generally not admissible where it appears that the person alleged to have been coerced had time and opportunity to deliberate upon the matter and to take the advice of an attorney.<sup>203</sup> But still the fact that a person refused the first demand for a conveyance of property to save his relative from a threatened prosecution, does not show that he was not under coercion when he yielded to a renewal of the demand, the danger of a prosecution remaining the same.<sup>204</sup> As in other cases, it is not necessary that the threats should be made directly to the party complaining by the party against whom relief is sought. It is sufficient if the latter is the beneficiary of the wrong done to the complainant, and if he made the threats knowing that they would be communicated to such complainant.<sup>205</sup> Finally, it should be remarked that, while duress thus exerted must always be such as to excite the fear of disaster, it may arise out of other terrors than that incited by the prospect that a relative will be cast into prison. Thus, in a case where a woman was induced to assign her property to make good an alleged defalcation or embezzlement by her son of his employer's money, and the moving cause was the employer's threat, several times repeated, to tell the woman's husband, who was in feeble health, and her fear that it would drive him into insanity, it was held that the question whether the property was obtained by duress was for the jury.<sup>206</sup>

**§ 236. Duress Exerted by Government or Municipalities.**—There is a kind of duress which may be exerted by governments or municipalities or their officers or agents upon private individuals and corporations, which consists in unlawful compulsion directed to the accomplishment of something which the law does not warrant. It is described

<sup>202</sup> *Holt v. Agnew*, 67 Ala. 360.

<sup>203</sup> *Sulzner v. Cappeau, Lumley & Miller Co.*, 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421.

<sup>204</sup> *Leflore County v. Allen*, 80 Miss. 298, 31 South. 815.

<sup>205</sup> *Martin v. Evans*, 163 Ala. 657, 50 South. 997.

<sup>206</sup> *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555.

as "moral duress not justified by law."<sup>207</sup> The illegality of the act or demand is the essential matter. Examples may be seen in the unlawful exaction of customs duties or internal revenue taxes, usually accompanied by the detention of property to force payment.<sup>208</sup> Thus, where a person whose property is illegally taxed is apprehended or his goods seized, or the tax collector with a warrant threatens immediately to arrest him to coerce payment, or to levy on and sell property to satisfy the tax, or to begin a criminal prosecution for non-payment, thereby inducing the belief that the menace will be put into execution, in consequence of which the tax is paid, the payment is involuntary and recoverable.<sup>209</sup> So, payment of a water tax or rent under threat of turning off the water in case of continued refusal is payment under compulsion, and if the charge is excessive, the excess may be recovered back.<sup>210</sup> And an agreement by a steamship company to pay the hospital expenses of immigrant passengers suffering from contagious diseases on their arrival, induced by threats of the immigration officers that they will otherwise detain such passengers on the vessel until their recovery, is made practically under duress, and being for something for which the company was not legally liable, is without consideration and cannot be enforced by the government.<sup>211</sup> But where a municipal corporation was authorized by a statute to erect and operate its own waterworks, and decided to act upon this authority, and a subsequent statute empowered it to purchase from a private corporation owning waterworks which then supplied the city, but not possessing an exclusive franchise, the fact that the competition by the city with the private corporation, if the city should erect its own waterworks, would

<sup>207</sup> *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405.

<sup>208</sup> *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 71; *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405; *Swift Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 247, 28 L. Ed. 343; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236. See *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987.

<sup>209</sup> *Johnson v. Crook County*, 53 Or. 329, 100 Pac. 294, 133 Am. St. Rep. 834.

<sup>210</sup> *Westlake v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

<sup>211</sup> *United States v. Holland-America Line (D. C.)* 205 Fed. 943.

be ruinous to the corporation, was held not to render the sale of its waterworks to the city under the second statute void as procured by duress.<sup>212</sup> In the case cited it was said: "If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress, because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. \* \* \*

Duress by the government or its officers, in this class of cases, is defined by the Supreme Court as 'moral duress not justified by law.' It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which renders acts voluntary in form involuntary and void. In this class of cases, the test is, was the cause of the compulsion lawful or unlawful? If the compulsion be founded on lawful competition, or the threat of lawful competition, there is no element of illegality about it. Such compulsion is justified by law. The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the state, was justified by law."

<sup>212</sup> *Newburyport Water Co. v. City of Newburyport* (C. C.) 103 Fed. 584.

## CHAPTER X

## UNDUE INFLUENCE

- § 237. Definitions of Undue Influence.
- 238. Duress and Fraud Distinguished.
- 239. Undue Influence as Ground for Rescission or Cancellation.
- 240. Fraudulent or Unfair Purpose Essential.
- 241. Acquisition and Exertion of Undue Influence.
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- 244. Benefit or Want of Independent Advice.
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- 249. Confidential Relations of Parties in General.
- 250. Dealings Between Attorney and Client.
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- 252. Dealings Between Parent and Child.
- 253. Burden of Proof and Evidence.

§ 237. Definitions of Undue Influence.—Undue influence consists in persuasion carried to the point of overpowering the will, or such a control over the person in question as prevents him from acting intelligently, understandingly, and voluntarily, and in effect destroys his free agency and constrains him to do that which he would not have done if such control had not been exercised.<sup>1</sup> It is any influence, however exercised, which destroys free agency, and substitutes the will of another for that of the person in whose name the act brought in judgment is done.<sup>2</sup> It must be equivalent to a species of moral coercion,<sup>3</sup> and influence obtained by flattery, importunity, threats, superiority of will, mind, or character, or by any art which would

<sup>1</sup> *Bennett v. Bennett*, 50 N. J. Eq. 439, 26 Atl. 573; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Marx v. McGlynn*, 88 N. Y. 370; *In re Logan's Estate*, 195 Pa. 282, 45 Atl. 729; *Mooney v. Olsen*, 22 Kan. 69; *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843.

<sup>2</sup> *Wing v. Havelik*, 253 Mo. 502, 161 S. W. 732.

<sup>3</sup> *In re Carroll's Will*, 50 Wis. 437, 7 N. W. 434.

give dominion over the mind to such an extent as to destroy free agency, is undue influence.<sup>4</sup> But not every influence is undue. A perfectly legitimate influence may be acquired and exercised over the mind of another, and its employment is not "undue" merely because it impels him to do something which he was at first reluctant or even unwilling to do. Thus, suggestion and advice, addressed to the judgment or conscience, or appeals to one's generosity or sense of duty, based on past kindness, love, esteem, or gratitude, do not of themselves constitute undue influence, that is, when not accompanied by any fraud or deception or by the employment of coercion or any other illegitimate means of control.<sup>5</sup> Generally speaking, influence exerted by means of advice, argument, persuasion, suggestion, solicitation, or entreaty, is not undue, unless it is so importunate and persistent, or otherwise so operates, as to subdue and subordinate the will of the person practised upon and deprive him of his freedom of choice and decision.<sup>6</sup> This subordination of the will is the real test. To convince the reason or to awaken an impulse of generosity is not to control the will. Advice, argument, or persuasion does not constitute undue influence, if the grantor's mind acts freely thereunder and he has the moral power to resist and reject it if he chooses, and there is no necessary inference of undue influence from the mere fact that the exertion of such means resulted in the execution of a deed or other instrument which the party would not otherwise have made.<sup>7</sup> In fact, no definition of what the law denominates "undue influence" can be framed which will furnish a safe and reliable test for every case. "All that can be said in the way of formulating a general rule on this subject is that whatever destroys free agency, and constrains the person whose act

<sup>4</sup> *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805.

<sup>5</sup> *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

<sup>6</sup> *Burnett v. Smith*, 93 Miss. 566, 47 South. 117; *Bowdoin College v. Merritt* (C. C.) 75 Fed. 480; *Wiltsey v. Wiltsey*, 153 Iowa, 455, 133 N. W. 665; *Breeding v. Tobin*, 13 Ky. Law Rep. 842, 18 S. W. 773; *Wherry v. Latimer*, 103 Miss. 524, 60 South. 563, 642; *Pritchard v. Pritchard*, 2 Tenn. Ch. App. 294.

<sup>7</sup> *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403.



is brought in judgment to do what is against his will, and what he would not have done if left to himself, is undue influence, whether the control be exercised by physical force, threats, importunity, or any other species of mental or physical coercion. The extent or degree of the influence is quite immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another, rather than the expression of the will and mind of the actor?"<sup>8</sup>

It should be added that statutory definitions have been given in the codes of some of the states, as follows: "Undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress."<sup>9</sup>

**§ 238. Duress and Fraud Distinguished.**—The distinction between duress and undue influence is not very clearly marked. In some cases both are present. In others, the two kinds of constraint so blend into each other that no clear line of demarcation can be pointed out. But generally, duress implies the yielding of the mind and will either to physical constraint actually exerted or to the fear of some threatened and intolerable misfortune, while undue influence accomplishes a like result by the exertion of authority, importunity, or the abuse of confidence, or by playing upon the passions, prejudices, or superstitions of a mind incapable of vigorous resistance. Duress drives, while undue influence leads, but both result in bringing the mind and will of the subject to the execution of something which he would not have done if left in perfect freedom. Influence which is certainly undue may be exercised by physical coercion or threats of personal harm or by such other

<sup>8</sup> Haydock v. Haydock, 33 N. J. Eq. 494.

<sup>9</sup> Civ. Code Cal., § 1575; Rev. Civ. Code Mont., § 4981; Rev. Civ. Code N. Dak., § 5296; Rev. Civ. Code S. Dak., § 1204; Rev. Laws Okl. 1910, § 906.

threats as are commonly considered as creating a state of duress. Thus, where one accused a young man of having embezzled his funds and represented to the mother of the person so accused that a prosecution would be begun against the son unless she would convey certain real estate to the one making the threat, which she did, acting under extreme distress and the apparent necessity of the case, it was held that she was entitled to have the deed set aside as having been obtained by undue influence.<sup>10</sup> But, as observed by the court in New York, there is another kind of influence more common, and that is where the mind and will of a testator (for example) have been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed the will, yet it was really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Such a will may be procured by working upon the fears or hopes of a weak-minded person by artful and cunning contrivances, by constant persuasion, pressure, and effort, so that the mind of the testator is not left free to act intelligently and understandingly.<sup>11</sup>

Strictly speaking, "fraud" and "undue influence" are not synonymous expressions. Undue influence is in one sense a species of constructive fraud, but while there are sometimes, and perhaps usually, elements of fraud present in the case, yet undue influence may exist without any positive fraud being shown.<sup>12</sup> Yet undue influence is closely allied to actual fraud, and, like the latter, when resorted to by an adroit and crafty person, its presence often becomes extremely difficult to detect.<sup>13</sup> On the other hand, fraud may be perpetrated without any kind of influence undue or otherwise. Thus, to induce one to sign a deed in the belief

<sup>10</sup> *Martin v. Evans*, 163 Ala. 657, 50 South. 997.

<sup>11</sup> *Marx v. McGlynn*, 88 N. Y. 357.

<sup>12</sup> *In re Shell's Estate*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181. And see *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Noble v. Enos*, 19 Ind. 72; *Sargent v. Roberts*, 265 Ill. 210, 106 N. E. 805; *Boardman v. Lorentzen*, 155 Wis. 566, 145 N. W. 750, 52 L. R. A. (N. S.) 476.

<sup>13</sup> *Grove v. Spiker*, 72 Md. 300, 20 Atl. 144.

that the instrument is a will is a plain fraud, but it does not constitute undue influence.<sup>14</sup>

§ 239. **Undue Influence as Ground for Rescission or Cancellation.**—Deeds or contracts procured by the exercise of undue influence are voidable only, and not void.<sup>15</sup> They are capable of ratification, and are *prima facie* good and valid until successfully impeached. The party seeking to avoid an instrument so procured must seek his remedy in a court of equity, treating the influence to which he was subjected as a species of constructive fraud. His remedy is not at law. But there is no doubt whatever that a court of equity has jurisdiction to annul, cancel, or set aside any deed or other grant obtained in this manner from a person who would not have executed it if left free to make his own decision, provided a proper and timely application is made, and supported by due proofs, by the person aggrieved.<sup>16</sup> Thus, heirs or devisees may maintain a suit in equity to set aside a deed of land obtained from their ancestor by undue influence practised upon him.<sup>17</sup> And where the execution of a deed was procured through undue influence, and a delivery was made without the grantor's assent, it is none the less voidable by reason of the fact that the grantee may not have been concerned in or had any part in the transaction.<sup>18</sup> But the rule is not confined to cases of grants or conveyances. Any kind of a contract which is unfair and disadvantageous to one of the parties, and to which his consent was not freely given, but was forced from him by the pressure of undue influence, may be rescinded by him for that cause, and his right of rescission may be enforced in equity.<sup>19</sup> Thus, in a case in Connecti-

<sup>14</sup> *Absalon v. Slickinger*, 102 App. Div. 383, 92 N. Y. Supp. 601. As to fraud perpetrated by misrepresenting the purport or contents of a written instrument, see, *supra*, § 71.

<sup>15</sup> *Beeson v. Smith*, 149 N. C. 142, 62 S. E. 888.

<sup>16</sup> *Wagg v. Herbert*, 215 U. S. 546, 30 Sup. Ct. 218, 54 L. Ed. 321; *Brown v. Fickle*, 135 Mo. 405, 37 S. W. 107; *Du Bose v. Kell*, 90 S. C. 196, 71 S. E. 371.

<sup>17</sup> *Harding v. Wheaton*, 2 Mason, 378, Fed. Cas. No. 6,051; *Letohatchie Baptist Church v. Bullock*, 133 Ala. 548, 32 South. 58.

<sup>18</sup> *Birdsall v. Leavitt*, 32 Utah, 136, 89 Pac. 397.

<sup>19</sup> *Kennedy v. Kennedy*, 2 Ala. 571; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

cut, it appeared that an estate was in process of administration in the probate court, and all the heirs joined in signing an agreement that the estate should be distributed in accordance with the directions given in a paper which the intestate had drafted as his will but which he had never signed. Afterwards one of the heirs sued in equity for a decree setting aside the agreement, on the ground that, being weak-minded and ignorant of his rights, he had been unduly influenced by the other heirs to sign the agreement, with the result that he had relinquished a much larger interest in the estate than he would receive under the agreement, and it was held that equity had jurisdiction of the application.<sup>20</sup> In some states, provision is made by statute for the rescission of contracts obtained by such means, as, where it is declared that "a party to a contract may rescind the same if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."<sup>21</sup>

A deed of gift, executed and acknowledged by one having legal capacity to convey, cannot be revoked at law, but may be avoided in equity for undue influence.<sup>22</sup> And so, a trust or settlement created by deed may be annulled and set aside if procured from the grantor or settlor by undue influence exercised by the persons benefiting by it.<sup>23</sup> And the beneficent powers of equity in these cases are most frequently exerted in those instances where the influence at work was gained by the existence of fiduciary or confidential relations between the parties, and it has been unfairly used as the means of gaining an undeserved benefit

<sup>20</sup> *Hart v. Hart*, 44 Conn. 327.

<sup>21</sup> Civ. Code Cal., § 1689; Rev. Civ. Code Mont., § 5063; Rev. Civ. Code N. Dak., § 5378; Rev. Civ. Code S. Dak., § 1283; Rev. Laws Okl. 1910, § 984.

<sup>22</sup> *Truman v. Lore*, 14 Ohio St. 144.

<sup>23</sup> *Ewing v. Basa*, 149 Ind. 1, 48 N. E. 241; *Smith v. Boyd*, 61 N. J. Eq. 175, 47 Atl. 816; *Hays v. Union Trust Co.*, 27 Misc. Rep. 240. 57 N. Y. Supp. 801; *Gibbes v. New York Life Ins. & Trust Co.*, 67 How. Prac. (N. Y.) 207.

or advantage.<sup>24</sup> It has been said: "In all cases where a contract or gift is claimed adversely to the beneficiary in the trust relation, as cestui que trust, client, ward, etc., courts of equity not only require of the trustee, attorney, guardian, etc., the most ample and convincing proofs of the entire fairness of the transaction, and possession of full information, knowledge, and intentional action on the part of the beneficiary, after competent and independent advice and deliberate consideration, but courts also set aside such contracts and gifts with great freedom, either as void from their intrinsic nature, or voidable because of the absence of the required proofs of full consideration, deliberate action, independent, intelligent, and competent advice, rational design, etc. The action, gift, contract, etc., must not only be intentional and with knowledge enough on the part of the beneficiary to care for his ordinary affairs, but such intentional act and knowledge must be characterized by these other elements in its composition."<sup>25</sup>

§ 240. **Fraudulent or Unfair Purpose Essential.**—In the popular sense of the word, "undue" means inordinate or disproportionate, but as used in the legal phrase "undue influence" it has a different and much stricter signification. It is here employed as denoting something wrong, according to the standard of morals which the law enforces in the relations of men, and therefore something legally wrong, something, in fact, illegal. Hence, in order to justify the intervention of equity on the ground of undue influence, it must appear that the influence exerted was wrongful, fraudulent, improper, or even, as stated in some of the cases, "malign."<sup>26</sup> But the existence of influence over a person

<sup>24</sup> *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23.

<sup>25</sup> *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105.

<sup>26</sup> *Caughey v. Bridenbaugh*, 208 Pa. 414, 57 Atl. 821; *Smith v. Kopitzki*, 254 Ill. 498, 98 N. E. 953; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Hacker v. Hoover*, 89 Neb. 317, 131 N. W. 734; *Watson v. Holmes*, 80 Misc. Rep. 48, 140 N. Y. Supp. 727; *Boggianna v. Anderson*, 78 Ark. 420, 94 S. W. 51. In North Carolina, the decisions appear to establish the rule that "undue" influence means a fraudulent influence or an influence fraudulently exerted, whereby the mind and will of the person operated on are subdued and the exercise of his free agency prevented. *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887. But it is not necessary that any actual fraud, moral

as a mere potentiality, never brought into play, is not a fact of which the law can take cognizance. It is not the existence of such influence that is important, but the exercise of it. It is not enough to show its existence, but its employment for a specific purpose and with a definite result must appear.<sup>27</sup> And again, the nature of the influence can be judged only by its result. It is the end accomplished which colors the influence exerted, and entitles us to speak of it as wrongful, fraudulent, or undue, on the one hand, or as proper or justifiable on the other hand. Hence a transaction cannot be avoided on this ground unless it appears that the influence was exercised for an undue and disadvantageous purpose.<sup>28</sup> Therefore we are to understand the word "undue" as describing not the nature or the origin of the influence existing, nor as measuring its extent, but as qualifying the purpose with which it is exercised or the result which it accomplishes. And influence is in this sense undue only when it induces a transaction which injures some one materially or which is intrinsically unfair or unconscionable. To induce a man to do that which he ought to do, or that which accords with justice, cannot be condemned by the law, no matter how the influence brought to bear upon his mind was acquired or how strenuously it was exerted. It is said that the line between due and undue influence as affecting the validity of a deed, when drawn, must be with full recognition of the liberty due to every owner of property to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of

turpitude, or improper motive should exist. *Bellamy v. Andrews*, 151 N. C. 256, 65 S. E. 963. So that, if one person obtains a dominant influence over the mind of another, and induces him to execute a deed or other instrument materially affecting his rights, which he would not otherwise have executed, so exercising the influence obtained that the grantor's will is effaced or supplanted, the instrument is fraudulent, in spite of the fact that the person exercising the influence did so from the best or most excellent motives. *Myatt v. Myatt*, 149 N. C. 137, 62 S. E. 887.

<sup>27</sup> The fact that the grantee in a deed had an influence over the grantor (her father) is immaterial if it does not appear that she made an improper use of it to induce her father to make the conveyance. *Garner v. Garner*, 4 Ky. Law Rep. 823.

<sup>28</sup> *Turner v. Turner*, 44 Mo. 535. And see *Pritchard v. Hutton* (Mich.) 153 N. W. 705.

kindred.<sup>29</sup> Fair argument or persuasion, or appeals to the conscience or sense of justice of a grantor, by one having a claim upon his bounty, do not, if such persuasion is fairly made, lay a foundation for vacating a deed executed as an apparent or possible result of such influence.<sup>30</sup> Hence there is no ground for the imputation of "undue" influence in the technical sense when, for example, a testator divides his property equally among all his children or approximately so,<sup>31</sup> or where a daughter obtains a conveyance of property from her father by personal solicitation, when her brothers and sisters have already received similar grants,<sup>32</sup> or when the grantee in a conveyance has given a full consideration for it, or at least a consideration not markedly inadequate.<sup>33</sup> And a contract will not be set aside on the ground of undue influence, apart from fraud, when it is proper in itself and is for the real advantage of the party who seeks to annul it, as, for instance, a conveyance made by a man habitually intemperate, but not drunk at the time of execution, transferring all his property in trust for his wife and children.<sup>34</sup>

**§ 241. Acquisition and Exertion of Undue Influence.—**As to the ways in which an overpowering influence upon the mind and will of another person may be acquired, they are as various as the circumstances of mankind. The facts disclosed in the many reported decisions on this subject show that the acquisition of such an influence is favored by the existence of a strong personality on the one side and of feeble powers of resistance on the other, by close and intimate intercourse, by the isolation of the subject from his friends and kindred, by sickness, old age, and feeble mentality, by circumstances giving the one person a power to check or control the purposes and impulses of the other, or the power to distress and embarrass him by a threatened

<sup>29</sup> *Wallace v. Harris*, 32 Mich. 380.

<sup>30</sup> *Boyer v. Boyer*, 33 Ohio Cir. Ct. R. 279.

<sup>31</sup> *In re Tunison's Will*, 83 N. J. Law, 277, 90 Atl. 695.

<sup>32</sup> *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 815.

<sup>33</sup> *Mauney v. Redwine*, 119 N. C. 534, 28 S. E. 52; *Hatch v. Ferguson* (C. C.) 57 Fed. 959; *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007.

<sup>34</sup> *Birdsong v. Birdsong*, 2 Head (Tenn.) 289.



course of action, by terrorization, importunity, persistent persuasion, and by every situation which puts the one person in a position of ascendancy and the other in a position of dependence and helplessness. But in order to set aside a deed, contract, will, or other instrument on this ground, it is not enough to show that the person benefiting thereby had acquired an influence over the mind of the subject, or even that he had an opportunity to exercise it, but it must be shown, by proof or legitimate inference, that such influence was actually exerted.<sup>35</sup> But undue influence does not imply the use of physical coercion or force, for the definition is satisfied by any influence, however acquired and exercised, which destroys the free will and free agency of the subject.<sup>36</sup> Such an influence having been acquired as will induce the one person to place implicit confidence in the other, it may be exercised "unduly" by abusing that confidence to perpetrate a fraud,<sup>37</sup> or to procure the execution of an instrument by a person who is ignorant of its contents or is deceived as to its nature or legal effect,<sup>38</sup> or to extort a grant or conveyance of property by a combination of false representations, promises, and threats,<sup>39</sup> as where one, having acquired a controlling influence over another, induces him to convey his property to him, under the pretense that such a course is necessary to save it from being seized and swept away by certain supposed creditors,<sup>40</sup> or that the grantor is in danger of being committed to an insane asylum, from which the grantee can save him,<sup>41</sup> or that, if the conveyance is not made, the grantor will be separated from his relatives and rendered homeless,<sup>42</sup> or that it is the only way to compromise and settle

<sup>35</sup> *In re Burke's Will*, 86 Misc. Rep. 151, 149 N. Y. Supp. 142; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369.

<sup>36</sup> *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087.

<sup>37</sup> *Austin v. Bridges*, 21 Ky. Law Rep. 694, 52 S. W. 966; *Spencer v. Merwin*, 80 Conn. 330, 68 Atl. 370.

<sup>38</sup> *Hammell v. Hyatt*, 59 N. J. Eq. 174, 44 Atl. 953; *Gorman v. McCabe*, 24 R. I. 245, 52 Atl. 989; *Disbrow v. Disbrow*, 164 N. Y. 564, 58 N. E. 1086.

<sup>39</sup> *Hayes v. Kerr*, 19 App. Div. 91, 45 N. Y. Supp. 1050.

<sup>40</sup> *Reck v. Reck*, 110 Md. 497, 73 Atl. 144.

<sup>41</sup> *Collins v. Seyfang*, 49 Wash. 554, 95 Pac. 1088.

<sup>42</sup> *Combs v. Davidson*, 24 Ky. Law Rep. 2528, 74 S. W. 261.

a litigation which is actually pending but is entirely unfounded in law.<sup>43</sup> So again, an influence over another may be unduly exercised by taking advantage of his pecuniary necessity and distress,<sup>44</sup> or by continuous and persistent persuasion and importunity, especially when directed upon the mind of a person who is incapable of vigorous resistance by reason of age, sickness, or a natural susceptibility to suggestion,<sup>45</sup> or who is cowed by the ill temper and quarrelsome disposition of the other.<sup>46</sup>

But undue influence does not always proceed by frontal attack, that is, by harshness, severity, threats, or direct solicitation. Its ways are often more insidious, and its approaches guarded and crafty. It is a favorite device of persons seeking illegitimately to further their own ends, by such means, gradually to prejudice the mind of the person practised upon against those who have natural claims upon his bounty, and to extirpate or poison his affection for them.<sup>47</sup> And such a course is best carried out when the subject is isolated and kept from the society of his friends and the benefit of their advice. This is well illustrated by a case in Georgia, in which the facts alleged in an administrator's bill in equity to set aside deeds made by his intestate, were as follows: That the defendants in the action were the children of the decedent by his first marriage; that he contracted a second marriage, and at the time of his death was survived by his widow and an infant son; that he was the owner of land and personal property; that his last illness endured for a period of about five months, during all of which time his mind and body were so weak that he had no will of his own; that while he was in this condition, the defendants entered into a conspiracy to defraud the widow and infant son, and had deeds to the different defendants prepared, which purported to be execut-

<sup>43</sup> *Tucker v. Roach*, 139 Ind. 275, 38 N. E. 822.

<sup>44</sup> *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

<sup>45</sup> *Ashmead v. Reynolds*, 134 Ind. 139, 33 N. E. 763, 39 Am. St. Rep. 238; *Tomlinson v. Tomlinson*, 162 Ind. 530, 70 N. E. 881; *Groesbeck v. Bennett*, 109 Mich. 65, 66 N. W. 664.

<sup>46</sup> *Albrecht v. Hunecke*, 196 Ill. 127, 63 N. E. 616; *Troub v. Thorp*, 152 Mich. 363, 116 N. W. 204.

<sup>47</sup> *Jordan v. Cathcart*, 126 Iowa, 600, 102 N. W. 510.

ed while the decedent was in the mental condition described; that no record of the deeds was made until after his death, and that, against his protest and that of his widow and of his physician, he was forcibly removed from his home, where he was living with his wife, and carried to the home of his daughter, where he died; and that he was never permitted to see his child, and whenever his wife came to the house she was driven away by the daughter. These facts were held to constitute a good cause of action.<sup>48</sup>

**§ 242. Effectiveness of Influence Must Appear.**—To set aside any transaction on the ground of undue influence it must be shown not only that such influence existed and that it was exercised, but also that it was exercised effectually, that is, that it was the efficient cause in bringing about the transaction complained of.<sup>49</sup> “The influence which the law denounces as undue influence over a testator must be such as to destroy his free agency, and amounts to moral or physical coercion. It must be proved, moreover, that the act done was the result of such coercion. There must be a control exercised over the mind of the testator, or an importunity practised, which he could not resist, or to which he yielded for the sake of peace.”<sup>50</sup> Hence if a person freely and voluntarily executes an instrument, possessing at the time sufficient mental capacity and being fully aware of all the circumstances, he cannot avoid it merely because he has changed his mind and wishes his act undone, although he was urged into doing it.<sup>51</sup> It is said that “it is a rule governing in ascertaining whether undue influence was exerted over the mind of a testator that the influence was such that it induced the testator to act contrary to his own wishes, and to make a different will from what he would have made if he had been left free to exer-

<sup>48</sup> *Jones v. Gilpin*, 127 Ga. 379, 56 S. E. 426. And see *Keller v. Gill*, 92 Md. 190, 48 Atl. 69; *Shawvan v. Shawvan*, 110 Wis. 590, 86 N. W. 165.

<sup>49</sup> *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357.

<sup>50</sup> *Trumbull v. Gibbons*, 22 N. J. Law, 117, 136.

<sup>51</sup> *Falls v. Falls*, 78 Iowa, 756, 42 N. W. 511; *Whitten v. McFall*, 122 Ala. 619, 26 South. 131; *Ditmas v. Ditmas*, 11 App. Div. 628, 42 N. Y. Supp. 108; *Hill v. Coakley*, 149 Ky. 814, 149 S. W. 1001.

cise his own wishes and desires according to his own judgment and discretion.”<sup>52</sup> Hence a contract or deed cannot be set aside on the ground of undue influence when it appears that the maker of it had enough mental capacity to understand the nature and character of the transaction, and that he was executing a fixed purpose of his own,<sup>53</sup> or carrying into effect an intention which he had previously expressed and declared.<sup>54</sup> Thus, a conveyance of property in consideration of support and maintenance, given to two sons who had lived with their father for many years, will not be set aside on an allegation that it was procured by their undue influence over him, where it is shown that he had repeatedly said that he would give his property to his sons, and that he had made a similar disposition of the property by will five years before.<sup>55</sup> So a deed by an epileptic of feeble mind, but competent to convey, will not be set aside, after his death, for undue influence, because given without consideration to a relative with whom he lived and who was a woman of strong character and determined mind, where the deed was made in lieu of a will, and accorded with the grantor’s wishes as to the disposition of his property.<sup>56</sup> And it is stated that, in determining the validity of a gift alleged to have been procured by undue influence, the court will consider not only the condition of the donor at the time of the gift, and the circumstances surrounding it, but also his previous life, habits, and relations to others, so as to ascertain the natural or probable objects of his bounty, and especially to discover any settled purpose which he may have had in regard to the disposition of his property.<sup>57</sup> But on the other hand, where a mother, after she became mentally and physically infirm, conveyed to her two sons, who resided with her and largely

<sup>52</sup> *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S. W. 394.

<sup>53</sup> *Wright’s Ex’r v. Wright*, 32 Ky. Law Rep. 659, 106 S. W. 856; *Garner v. Garner*, 4 Ky. Law Rep. 823.

<sup>54</sup> *Lodewyck v. Lacroix*, 115 Mich. 590, 73 N. W. 897; *Latimer v. Latimer*, 174 Ill. 418, 51 N. E. 548.

<sup>55</sup> *Clafin v. Clafin*, 102 Iowa, 744, 71 N. W. 210; *Coombe’s Ex’r v. Carthew*, 59 N. J. Eq. 638, 43 Atl. 1057.

<sup>56</sup> *Nutting v. Pell*, 11 App. Div. 55, 42 N. Y. Supp. 987.

<sup>57</sup> *Simpson v. League*, 110 Md. 286, 72 Atl. 1109.

attended to her business, the farm on which she lived and the personal property on it, in consideration of their promise to support her during life, and the deed disposed of the property in a manner different from what she had declared to be her intention when in much better health, and about the time the deed was made she expressed a prejudice against her other children, with whom she had always been on good terms, and the evidence authorized the inference that this prejudice had been engendered by the sons, it was held that a judgment setting aside the deed should not be disturbed, as the law always looks with suspicion upon voluntary transfers of property by persons mentally and physically infirm to those having the custody of them.<sup>58</sup>

§ 243. **Influence Based on Gratitude and Affection.**—Undue influence means wrongful or fraudulent influence, and the term does not include such influence as may be secured through affection and gratitude. Acts of kindness and generosity, of care and devotion, of filial respect and duty, or patience, love, and sympathy, may well create a powerful influence, but it is one which the law recognizes as natural and beneficial. And though a gift or grant may be made to a person at his solicitation, and prompted by the partiality which the donor or grantor feels for him, leading him to prefer such beneficiary to others equally near to him, and who might have acquired equal favor by similar conduct, yet it cannot be said to have been gained by undue influence, where the mind of the grantor or donor acted freely and his motives grew out of such partiality and affection.<sup>59</sup> Even under these circumstances, however, an

<sup>58</sup> *Talbott v. Bedford*, 21 Ky. Law Rep. 807, 53 S. W. 294.

<sup>59</sup> *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Adair v. Craig*, 135 Ala. 332, 33 South. 902; *Turner v. Gumbert*, 19 Idaho, 339, 114 Pac. 33; *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. W. 240; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Sargent v. Roberts*, 265 Ill. 210, 106 N. E. 805; *Preston v. Lloyd*, 269 Ill. 152, 109 N. E. 687; *Beavers v. Bess*, 58 Ind. App. 287, 108 N. E. 266; *Baker v. Baker*, 169 Iowa, 473, 151 N. W. 459; *Hughes v. Silvers*, 169 Iowa, 366, 151 N. W. 514; *Steen v. Steen*, 169 Iowa, 264, 151 N. W. 115; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *Collier v. Dundon*, 164 Ky. 345, 175 S. W. 635; *Nelson v. Wiggins*, 172 Mich. 191, 137 N. W. 623; *Jackson v. Hardin*, 83 Mo. 175;

influence so acquired may be put to an undue use, and it is to be condemned if used with such weight or importunity as to confuse the judgment of the grantor and to subordinate and control his will effectually.<sup>60</sup> "The rule is established," it is said, "that undue influence must be such as amounts to overpersuasion, coercion, or force, destroying the free agency and will power of the testator. It must not be merely the influence of affection or attachment, nor the desire of gratifying the wishes of one beloved and trusted by the testator."<sup>61</sup> On this point, the Supreme Court of the United States has said: "It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary dispositions, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them. Undue influence must destroy free agency. It is well settled that, in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed and that his will was overborne by excessive importunity, imposition, or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising such influence. That the relations between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law de-

McKissock v. Groom, 148 Mo. 459, 50 S. W. 115; Goodman v. Griffith, 238 Mo. 706, 142 S. W. 259; Hacker v. Hoover, 89 Neb. 317, 131 N. W. 734; Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

<sup>60</sup> Sawyer v. White, 122 Fed. 223, 58 C. C. A. 587; Wherry v. Latimer, 103 Miss. 524, 60 South. 563, 642; Brugman v. Brugman, 93 Neb. 408, 140 N. W. 781; Hacker v. Hoover, 89 Neb. 317, 131 N. W. 734.

<sup>61</sup> Riley v. Sherwood, 144 Mo. 354, 45 S. W. 1077. And see Schofield v. Walker, 58 Mich. 96, 24 N. W. 624.

nounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained.”<sup>62</sup> This principle is also well illustrated by a case in Tennessee, in which it appeared that a homeless old man, turned away from the houses of his son and of two of his grandchildren by their unkindness, was finally taken in and kindly cared for by a third grandchild. Thereafter he expressed to several persons his intention of giving his land to such grandchild and her husband, because they had been good to him, and to that end he regularly executed a deed of such land, which was first read to him. His son and the other grandchildren misrepresented to him the terms of the instrument which he had signed and tried in various ways to induce him to disclaim it. But he persistently refused to do so, telling several persons that he gave the land to the grantees, and that he was satisfied with the deed, and writing to his son to the same effect. He lived for two years after the execution of the deed, and never tried to revoke it or have it canceled. It was held that no showing of fraud or undue influence could be made out from the facts as stated.<sup>63</sup>

The principle stated in this section is most commonly applied, according to the facts occurring in actual life, to gifts or grants as between parent and child. But it is equally applicable in other relations of life. Thus, it is said that influence secured through affection by a grantor for his foster child is not undue influence.<sup>64</sup> And such influence as a man's wife may acquire over him by her personal demeanor and conduct towards him, as his wife, and the fact that she gains his affection and confidence by her kind and

<sup>62</sup> *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 84.

<sup>63</sup> *Martin v. Winton* (Tenn. Ch. App.) 62 S. W. 180.

<sup>64</sup> *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881.



dutiful treatment of him and her general behavior towards him, does not constitute undue influence.<sup>65</sup>

§ 244. **Benefit or Want of Independent Advice.**—The English cases favor the rule that, in every case of a gift or grant between persons occupying a fiduciary or confidential relationship, where the advantage is on the side of the one who is the trustee or the dominant party to the relationship, it must be absolutely shown that the donor or grantor had the benefit of competent disinterested advice before concluding the transaction, or else its validity cannot be sustained. One of the English judges has said: "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little, if any, importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence."<sup>66</sup> This rule has also been followed by some of the American courts.<sup>67</sup> Thus, in a case in New Jersey, a grantor, when conveying practically all of her property to her daughter and son-in-law for their past kindness and the mere expectation of future support, was so situated as to be altogether dependent upon the grantees for proper care and attention, making their influence over her dominant. It was held that she was en-

<sup>65</sup> *Andrew v. Linebaugh*, 260 Mo. 623, 169 S. W. 135.

<sup>66</sup> *Rhodes v. Bate*, L. R. 1 Ch. App. 257.

<sup>67</sup> *Stevens v. Shaw*, 66 N. J. Eq. 116, 57 Atl. 1024; *Walsh v. Harkey* (N. J. Ch.) 69 Atl. 726; *Harrison v. Axtell*, 76 N. J. Eq. 614, 75 Atl. 1100; *In re Cooper's Will*, 75 N. J. Eq. 177, 71 Atl. 676.

titled to have independent counsel to protect her interests on thus parting with substantially her entire property, without any security for her future support, and to have her attention directed to the effect of the deed, and especially to the fact that the instrument was not revocable, and that after making it she would be dependent on the good will or the charity of the grantees for the rest of her life, and that, as she was not so protected, the deed was voidable.<sup>68</sup>

But the majority of the American decisions do not go to this extent. They hold that the benefit or the want of independent advice may be a very important factor in determining the validity of a deed or other instrument, but not that it is conclusive. As bearing on the question of undue influence, it may be shown that a donor or grantor was aged, infirm, mentally feeble, or illiterate, was dominated by the superior intelligence and more powerful will of the other party, was coerced or deceived, was isolated from his friends, was put in fear, anxiety, or distress of mind, was persistently importuned, or was otherwise deprived of the power of exercising an unrestricted choice. And it is on facts such as these that the case must mainly rest. But it is competent to show that the grantor or donor also lacked the benefit of good and disinterested advice, and if this further fact appears, and especially if it is shown that he was in any way prevented from seeking and obtaining such advice, then this factor will have an important bearing on the case, and may turn the scale.<sup>69</sup> On the other hand, if it appears that the party executing the deed or other instrument was advised by competent third persons as to the business expediency of what he was about to do or as to the legal effect of the instrument he was about to sign, and fully understood the entire transaction, then this circum-

<sup>68</sup> *Walsh v. Harkey* (N. J. Ch.) 60 Atl. 726.

<sup>69</sup> *Connelly v. Fisher*, 3 Tenn. Ch. 382; *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107, 127 Am. St. Rep. 345; *Fagan v. Lentz*, 156 Cal. 681, 105 Pac. 951, 20 Ann. Cas. 221. But see *Carney v. Carney*, 196 Pa. 34, 46 Atl. 264, holding that want of independent advice to a parent is no objection to his deed of property to a child who has supported him for years.

stance may be sufficient to rebut an inference of undue influence arising out of the other circumstances of the case.<sup>70</sup> Thus, where a widow, who was a woman of firm character and good business capacity, and who contemplated remarriage, went with her children to the office of a notary and there executed a deed to them conveying land which the children themselves had helped to pay for, reserving to herself a life estate therein, and it appeared that the notary fully explained the effect of the deed before she signed it, and also that she had consulted a lawyer in reference to the transfer before going to the notary, it was held that the fact that the deed contained no power of revocation would not prevent the settlement from being deemed her free and voluntary act.<sup>71</sup> Even the opportunity to obtain independent advice, with a warning that it will be best to seek it, may be enough to show that there was no fraud or coercion in obtaining a deed. Thus, in a case in Tennessee, it was held that a conveyance by a married woman of her realty to her brother to satisfy a default of her husband, which the brother agreed to assume, made within a day after she learned of such default, should not be set aside as obtained by fraud and undue influence, where she fully understood the transaction, was advised by the brother to consult others in reference to it, and was warned by him that the execution of the conveyance would mean giving up her home.<sup>72</sup> But if the advice in respect to the transaction comes from a source that is not disinterested, or is even hostile to the person to be advised, it is of course not such as the law requires, as, for instance where it is given by counsel for the party to be benefited by the transaction. And in this case it may operate strongly against the validity of the conveyance, instead of in its favor.<sup>73</sup> But in general, where one has the mental capacity to contract, and no fraud

<sup>70</sup> *Vrooman v. Grafflin*, 96 Fed. 275, 37 C. C. A. 475; *Zeok v. Mercantile Trust Co.*, 194 Pa. 388, 45 Atl. 215; *Chambers v. Brady*, 100 Iowa, 622, 69 N. W. 1015.

<sup>71</sup> *Valter v. Blavka*, 195 Ill. 610, 63 N. E. 499.

<sup>72</sup> *Maney v. Morris* (Tenn. Ch. App.) 57 S. W. 442.

<sup>73</sup> *Hubert v. Traeder*, 139 Mich. 69, 102 N. W. 283; *James v. Groff*, 157 Mo. 402, 57 S. W. 1081.

is practised upon him, he cannot plead that he acted under bad advice, as a ground for rescinding his contract.<sup>74</sup>

§ 245. **Time of Exerting Influence with Reference to Gift or Grant.**—To warrant the avoidance of a gift, grant, or other transaction on the ground of its having been procured by undue influence, such influence must be shown to have existed and been exercised at the time of the execution of the deed or the making of the transaction in question.<sup>75</sup> Thus, a grantor cannot procure the vacation of his deed on the mere ground that he reposed great confidence in the grantee, and that his influence due to former confidential relations still remained, without also showing that the execution of the deed was the result of the exertion of that influence.<sup>76</sup> But the mere fact that the grantee was not in the room while a deed was being executed is not sufficient to show that the influence of a confidential relationship which existed between the grantor and grantee did not subsist and operate upon the mind of the grantor at that moment.<sup>77</sup> But deeds executed by a father to his sons, accomplishing the same result which was achieved by the grantor's executing a will six years before, at a time when no doubt existed as to his freedom of action, will not be set aside for undue influence, notwithstanding the court may have doubts as to the weight of the evidence on the subject of the fairness of the influence exerted by the sons.<sup>78</sup>

§ 246. **Degree or Measure of Influence Required.**—The undue influence which will justify the avoidance of a gift, grant, or other transaction must have operated with such power and stress as to place the subject in *vinculis*, destroy his free agency, dominate his will to make it serve the purpose of another, and so coerce him into doing something

<sup>74</sup> *Carroll v. People*, 13 Ill. App. 206.

<sup>75</sup> *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Riordan v. Murray*, 249 Ill. 517, 94 N. E. 947; *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *Kline v. Kline*, 14 Ariz. 369, 128 Pac. 805.

<sup>76</sup> *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

<sup>77</sup> *White v. Daly* (N. J. Eq.) 58 Atl. 929.

<sup>78</sup> *Taphorn v. Taphorn*, 32 Ohio Cir. Ct. R. 96.

which he has no wish to do, but which he is unable to refuse.<sup>79</sup> Thus, mere persuasion does not amount to undue influence where it does not override the will of the person addressed, though it induces him to make a disposition of his property different from what he would otherwise have made.<sup>80</sup> But if the effect is produced, the law is not concerned to measure the exact degree of influence exerted. No matter how slight it may be, if it does in effect deprive the subject of his freedom of choice and will, it will invalidate the acts or deeds resulting from it.<sup>81</sup> "The extent or degree of the influence is quite immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another, rather than the expression of the will and mind of the actor?"<sup>82</sup>

§ 247. **Age and Infirmary of Grantor or Donor.**—In determining whether undue influence has been exerted, it is important to take into consideration the age and physical condition of the person in question. For since it is of the

<sup>79</sup> *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Bowdoin College v. Merritt* (C. C.) 75 Fed. 480; *Stroup v. Austin*, 180 Ala. 240, 60 South. 879; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; *Sargent v. Roberts*, 265 Ill. 210, 106 N. E. 805; *Riordan v. Murray*, 249 Ill. 517, 94 N. E. 947; *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *Nixon v. Klise*, 160 Iowa, 238, 141 N. W. 322; *Yahr v. Hynes*, 159 Ky. 518, 167 S. W. 680; *Kennedy v. Kennedy*, 124 Md. 38, 91 Atl. 759; *Somers v. McCready*, 96 Md. 437, 53 Atl. 1117; *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071; *In re Tunison's Will*, 83 N. J. Law, 277, 90 Atl. 695; *Howard v. Howard*, 112 Va. 566, 72 S. E. 133; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; *Erwin v. Hedrick*, 52 W. Va. 537, 44 S. E. 165; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Ritz v. Ritz*, 64 W. Va. 107, 60 S. E. 1095; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Drinkwine v. Gruelle*, 120 Wis. 628, 98 N. W. 534. And see *Akers v. Mead* (Mich.) 154 N. W. 9. In determining whether or not a deed was obtained by undue influence, the grantor's powers of resistance to the exertion of influence, as shown by his physical and mental condition, must be considered. *Youtsey v. Hollingsworth* (Mo.) 178 S. W. 105.

<sup>80</sup> *Posey v. Donaldson*, 189 Ala. 366, 66 South. 662.

<sup>81</sup> *Watson v. Holmes*, 80 Misc. Rep. 48, 140 N. Y. Supp. 727.

<sup>82</sup> *Haydock v. Haydock*, 33 N. J. Eq. 494.

essence that he should have been led to do something which would not have been in accordance with his own wishes and desires if left perfectly free, it follows that we must take into account the measure of the susceptibility of his mind to outside influences, or, in other words, the degree of resistance which it is able to offer to the suggestion of a course of action naturally repugnant or undesired. And it is well known that in most cases, though not invariably, this susceptibility is increased, and those powers of resistance are weakened, by the effects upon the mind and will of advanced age, sickness, and the prostration of the physical powers. When these conditions exist, the field is ripe for any one possessing influence over the subject to exercise it. And if a gift or grant is made by a person thus enfeebled by age and infirmity to one shown to possess an influence over him, and especially if the transfer does not appear to be based upon any proper consideration or to be prompted by any adequate motive, a very strong showing of undue influence will have been made.<sup>83</sup> Thus, in one case, evidence that a frail old man conveyed all his property, worth many thousand dollars, to his housekeeper, without any consideration, was held sufficient to avoid the deed for undue influence.<sup>84</sup> And a similar ruling was made in a case where the grantor in a deed was old, sick with an incurable disease, and so broken in mind and body from the excessive use of stimulants as to be incapable of realizing what he was doing,<sup>85</sup> and in a case where a woman, who sold her property for an insufficient price on the suggestion of the purchaser that she had best convert it into money so as to avoid a threatened litigation, was shown to have been in a condition of great mental distress in consequence of the death of her husband, and so agitated and despondent at and about the time of the transfer that she talked of suicide

<sup>83</sup> See *Haydock v. Haydock*, 33 N. J. Eq. 494; *Morton v. Davis*, 105 Ark. 44, 150 S. W. 117; *Casey v. Howard*, 105 Ga. 198, 31 S. E. 427; *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087; *Holland v. John*, 60 N. J. Eq. 435, 46 Atl. 172; *Caddell v. Caddell* (Tex. Civ. App.) 131 S. W. 432.

<sup>84</sup> *Aldrich v. Steen*, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311.

<sup>85</sup> *Wolf v. Harris*, 57 Or. 276, 106 Pac. 1016, 111 Pac. 54.

and received the ministrations of a physician and a priest.<sup>86</sup> Particularly does the law regard with grave suspicion a transfer of property made by a person upon his death-bed. There are indeed cases in which the mental faculties remain unclouded, and the will resolute, almost to the very moment of dissolution. But this is not usually the case, and if advantage is taken of a dying grantor, whose physical strength is spent and whose mind is weak, any influence brought to bear upon him, though it be no more than mere solicitation, will be an undue influence and justify the avoidance of the grant.<sup>87</sup>

But evidence of this kind is not conclusive. Though it be shown that a grantor or donor was aged, feeble, diseased, or even moribund, yet this alone is not ground for undoing his acts, and if it appears that he nevertheless understood clearly what he was doing and was fully informed of the facts which might or should have guided his decision, the transaction should not be set aside without positive proof of undue influence.<sup>88</sup> It is said that undue influence in procuring an assignment of property rights cannot be inferred solely from the advanced age of the assignor,<sup>89</sup> and in fact, that old age, physical infirmity, and feebleness of intellect on the part of a grantor do not raise any legal presumption of undue influence exerted upon his mind.<sup>90</sup> And a written contract, executed by one in a dangerous illness and in contemplation of death, cannot be rescinded on his recovery if it is not shown that his mind was impaired, or that it was secured by fraud or undue influence.<sup>91</sup>

**§ 248. Temporary or Permanent Mental Weakness of Subject.**—Contracts and conveyances made by persons who are mentally infirm, with feeble understanding and impaired or subnormal faculties of reasoning and judgment, will

<sup>86</sup> *Bruguler v. Pepin*, 106 Iowa, 432, 76 N. W. 808.

<sup>87</sup> *Wiltsey v. Wiltsey*, 153 Iowa, 455, 133 N. W. 665; *Dooley v. Holden*, 53 App. Div. 625, 65 N. Y. Supp. 713.

<sup>88</sup> *Montgomery v. Clark* (Tenn. Ch. App.) 46 S. W. 466; *Furlong v. Sanford*, 87 Va. 506, 12 S. E. 1048.

<sup>89</sup> *Holmes v. Holmes*, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444.

<sup>90</sup> *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779.

<sup>91</sup> *Wallace v. McVey*, 6 Ind. 300.



be closely scrutinized by courts of equity to discover whether any fraudulent or sinister influence has been exerted upon them, and such transactions will be set aside if their nature justifies the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon or overcome by cunning or undue influence.<sup>92</sup> As observed by the Supreme Court of the United States: "It is sufficient to show that [the grantor] from her sickness and infirmities, was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. \* \* \* It may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside."<sup>93</sup>

To illustrate the application of this rule, we may first cite a case in which it appeared that the plaintiff was seventy-five years of age, sickly, childish, and eccentric, and generally considered by his neighbors to be insane. Being without ready money or means of support, and having no one to care for him, he conveyed his farm to the defendant in the action. This was done at the defendant's solicitation, and upon his promise to maintain and support the plaintiff during the remainder of his life. But the farm greatly exceeded in value the probable cost of such maintenance for the period of plaintiff's reasonable expectation of life. In addition, there was evidence showing that the plaintiff failed clearly to understand the nature of the transaction, and the

<sup>92</sup> *Elmstedt v. Nicholson*, 186 Ill. 580, 58 N. E. 381; *McDowell v. Edwards' Adm'r*, 156 Ky. 475, 161 S. W. 534; *Heath v. Tucker*, 153 Mo. App. 356, 134 S. W. 572; *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *Meyer v. Fishburn*, 65 Neb. 626, 91 N. W. 534; *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Baugh v. Buckles*, 2 Ohio Cir. Ct. R. 498; *Zelgler v. Shuler*, 87 S. C. 1, 68 S. E. 817; *Du Bose v. Kell*, 90 S. C. 196, 71 S. E. 371; *Crebs v. Jones*, 79 Va. 381.

<sup>93</sup> *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260.

conveyance was set aside as having been procured by undue influence.<sup>94</sup> In another case, a woman seventy years old, of weak mind, subject to vagaries and hallucinations, left her nephew's home where she had been living, and after being arrested for vagrancy and taken in charge by the poor department, was assigned to a "home." She had about \$3,000 in a bank. Soon after entering the home, she signed drafts for the money in bank, payable to the home, which had been prepared by the attorney for the home and were signed in his presence and that of the matron, the consideration being supposed to be the support of the woman during her life and her burial after death. It was held that the assignment was void for undue influence.<sup>95</sup>

It should be carefully noted that this is altogether a different matter from the question of the grantor's possessing testamentary or contractual capacity. If he has not, his deed is void or voidable, but not on the ground of undue influence. In the proper and legal sense of the term, undue influence cannot be exerted over an insane person.<sup>96</sup> Inducing one to act who has not sufficient mind to know what he is doing, is an actual fraud, but does not constitute undue influence.<sup>97</sup> Bargains cannot be made with a person who is an imbecile,<sup>98</sup> and where a deed was not knowingly executed a claim that it was procured through undue influence cannot be supported.<sup>99</sup> The condition in which such influence may be brought to bear is that in which the person practised upon is not insane nor an idiot, but yet is so weak-minded that he may be readily cajoled or bullied into doing what he does not wish to do.<sup>100</sup> Hence, on the one hand, it is not necessary, in order to prove undue influence, that the mind shall be shown to be so weak as to render the person upon whom the influence is exercised incapable of attend-

<sup>94</sup> *Kennedy v. Currie*, 8 Wash. 442, 28 Pac. 1028.

<sup>95</sup> *McCormick v. St. Joseph's Home*, 26 Misc. Rep. 36, 55 N. Y. Supp. 224.

<sup>96</sup> *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273.

<sup>97</sup> *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45.

<sup>98</sup> *Mason v. Dunbar*, 43 Mich. 407, 5 N. W. 432, 38 Am. Rep. 201.

<sup>99</sup> *Kosturska v. Bartkiewicz*, 241 Ill. 604, 89 N. E. 657.

<sup>100</sup> *Johnson v. Stonestreet*, 23 Ky. Law Rep. 2102, 66 S. W. 621.

ing to ordinary business,<sup>101</sup> and on the other hand, a deed may be canceled as having been procured by undue influence, although executed by a person of perfectly sound mind.<sup>102</sup> The mental condition which lies between these extremes, and in which susceptibility to undue influence may be expected, is shown in a case in Vermont, where the courts set aside a transfer of property made by a woman to secure certain alleged indebtedness, where it appeared that she was ninety years old, that her memory was seriously impaired, that she had not sufficient memory and mental vigor to understand whether she owed the debts or not, that she could not distinguish between her own debts and those of others, and allowed debts to be included in the list simply on the allegation of the creditor that they were all right, and that she was persuaded by her son, who had much influence over her.<sup>103</sup>

It is not necessary that the weakness of mind here referred to should be congenital or permanent, nor is any importance to be attached to its cause or origin. As remarked by an eminent writer, there are "cases where a person, although not positively non compos or insane, is yet of such great weakness of mind as to be unable to guard against imposition or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises, whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those incidental depressions which result from sudden fear or constitutional despondency or overwhelming calamities; for it has been well remarked that, although there is no direct proof that a man is non compos or delirious, yet if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him while in extremis, or when he is a paralytic, it cannot be supposed that he had a mind adequate to the business which he was about, and he might very easily be imposed upon."<sup>104</sup> Such a case was present-

<sup>101</sup> *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805.

<sup>102</sup> *Campbell v. Lima*, 212 Mass. 11, 98 N. E. 610.

<sup>103</sup> *King v. Cummings*, 60 Vt. 502, 11 Atl. 727.

<sup>104</sup> 1 Story, Eq. Jur. § 234.

ed where a woman laboring under great physical and mental prostration and shock, it being the second day after the sudden and violent death of her husband, and she being pregnant, and being without any independent advice, conveyed her entire interest in her late husband's estate, worth a large sum of money, without any consideration. It was held that a bill to set aside the conveyance, stating the foregoing facts, was not demurrable though it failed to allege undue influence in so many words.<sup>105</sup> And relief in equity has been granted on similar grounds where the conveyance attacked was shown to have been executed by a person suffering from a nervous disease which reacted upon his mental faculties and impaired his judgment and understanding,<sup>106</sup> or by one who had recently suffered a stroke of paralysis which beclouded his mind and weakened his will,<sup>107</sup> or by an habitual drunkard, whose indulgences had materially impaired his intellect,<sup>108</sup> or by a victim of the morphine habit.<sup>109</sup>

But on the other hand, the fact that the grantor in a deed was physically feeble or infirm, far advanced in age, or suffering from illness does not give rise to any necessary presumption that his mental faculties were impaired or in any way inadequate to the business in hand. And if it is shown, on the contrary, that he was in the full possession of his memory, judgment, understanding, and will power, and that his grant was supported by an adequate consideration or by an adequate motive, such as gratitude and affection for past kindness or the well-founded expectation of future care and support, it cannot be said to have been obtained by undue influence over him.<sup>110</sup>

#### § 249. Confidential Relations of Parties in General.

When two persons stand in a fiduciary or confidential rela-

<sup>105</sup> *Moore v. Moore*, 56 Cal. 89.

<sup>106</sup> *Frush v. Green*, 86 Md. 494, 39 Atl. 863.

<sup>107</sup> *Stohr v. Stohr*, 148 Cal. 180, 82 Pac. 777; *Drake v. Mann*, 81 N. J. Eq. 201, 86 Atl. 261.

<sup>108</sup> *Rutherford v. Ruff*, 4 Desaus. (S. C.) 350.

<sup>109</sup> *Disch v. Timm*, 101 Wis. 179, 77 N. W. 196.

<sup>110</sup> *Reinert v. Rhody*, 52 La. Ann. 2029, 28 South. 277; *Madre v. Gaskins*, 39 App. D. C. 19; *Lyons v. Elston*, 211 Mass. 478, 98 N. E. 93.

tionship to each other,—that is, a relationship such that confidence is necessarily reposed in, and deference accorded to, one of them by the other, and that other possesses a corresponding influence,—any exertion of the influence so possessed will be “undue” in the contemplation of the law, if it results in a transaction which is beneficial to the dominant party and disadvantageous to the other. If such a relationship, with its corresponding authority, is shown to have existed, and if it is further shown that the bargain made was disadvantageous to the dependent or subordinate party, then a presumption of undue influence arises by operation of law, and the party seeking to retain the benefit of the transaction must assume the burden of showing that it was perfectly fair and equitable, voluntary and uncoerced, and completely understood, and this he must do by proof entirely independent of the instrument under which he may claim; and if the evidence falls short of establishing these defensive facts, equity will not hesitate to set the transaction aside.<sup>111</sup>

Within the meaning of this rule, a fiduciary or confidential relationship exists wherever a confidence is reposed on the one side and domination and influence is exerted by reason thereof on the other side.<sup>112</sup> It does not depend on the technical relation of trustee and cestui que trust, but on the confidence accorded by the one person and the resulting influence and superiority of the other.<sup>113</sup> But there is this important difference, that in some cases the law will conclusively presume, from the mere fact of the relationship, that

<sup>111</sup> *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; *McCord v. Bright*, 44 Ind. App. 275, 87 N. E. 654; *Hoeb v. Maschinot*, 140 Ky. 330, 131 S. W. 23; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Cadwallader v. West*, 48 Mo. 483; *Jones v. Belshe*, 238 Mo. 524, 141 S. W. 1130; *Sears v. Shafer*, 6 N. Y. 268; *Adee v. Hallett*, 3 App. Div. 308, 38 N. Y. Supp. 273; *Mullins v. McCandless*, 57 N. C. 425; *Baugh v. Buckles*, 2 Ohio Cir. Ct. R. 498; *Cooke v. Lamotte*, 15 Beav. 239. On the subject of fraud practised by taking advantage of confidential or fiduciary relations, see, *supra*, §§ 40–51.

<sup>112</sup> *Mors v. Peterson*, 261 Ill. 532, 104 N. E. 216; *Boney v. Hollingsworth*, 23 Ala. 690.

<sup>113</sup> *Ehrich v. Brunshwiler*, 241 Ill. 592, 89 N. E. 799.

such confidence was given and such influence enjoyed, while in others no such presumption arises. To the former class of cases belong such relationships as those of trustee and cestui que trust, attorney and client, parent and child, guardian and ward, husband and wife, and perhaps some others. Where such a relation is shown, there is a natural and necessary inference that it engendered confidence on the one side and authority on the other. But in other cases, such confidence and such authority must be shown by evidence. But when this is done, the presumption that any exertion of that influence which resulted to the advantage of the party possessing it was an "undue" influence is alike in both classes of cases, in the case of an actual as well as a technical trust. Thus, it is said that relations of mutual friendship between the parties to a deed, and of social regard and esteem, are not sufficient to create a suspicion, much less a presumption, of undue influence in procuring it.<sup>114</sup> But when the confidence is shown to have been reposed and the influence to have existed, its source will be immaterial, for a person is as much bound to act for the best interests of another who has trusted him as a friend, as if he had been appointed a trustee.<sup>115</sup> But it is not easy to draw the line between the two classes of cases. For instance, it is ordinarily the case that brothers and sisters trust each other fully, each believing that the other would safeguard his interests as carefully as his own and would do nothing to impose upon him. But the mere existence of kinship in this degree is not held to warrant a presumption that either party exerted a dominating influence over the other. A transaction between two brothers, or two sisters, or between a brother and sister, cannot be set aside merely because it is advantageous to the one and prejudicial to the other. But if, in addition to this, it is shown that the one did actually repose special confidence in the other, and that there resulted therefrom a corresponding influence and authority, then the exertion of it to the disadvantage of the

<sup>114</sup> *Frederic v. Wilkins*, 182 Ala. 343, 62 South. 518; *Smith v. Curtis*, 19 Fla. 786.

<sup>115</sup> *Turner v. Turner*, 44 Mo. 535.

person controlled may be presumed to be an undue influence.<sup>116</sup> So, in a case where it was shown that the relation between the complainant and his brothers-in-law was exceedingly intimate, and the trust and confidence which he reposed in them was such that he regarded his property and interests as entirely safe in their hands, it was held that such relation was fiduciary in character, so as to preclude the brothers-in-law from retaining the benefit of a voluntary conveyance which they induced complainant to execute to them at a time when he was much prostrated in mind and body by a recent domestic calamity, though not incapable of transacting ordinary business.<sup>117</sup>

Again, the tendency of the authorities is to hold that the relation of a physician to his patient is necessarily one of confidence, and that, while the mere fact that the grantee in a deed was the medical adviser of the grantor at the time of its execution, does not conclusively show undue influence, yet any such transaction will be regarded as suspicious and will be closely scrutinized, and even, as some of the decisions hold, the burden of proof is on the physician to show that the patient had competent and disinterested advice, or that he entered into the transaction voluntarily and with full comprehension of it.<sup>118</sup> And the same doctrine has sometimes been extended to the relation of nurse and patient.<sup>119</sup> So also, most persons are supposed to be susceptible to the influence and authority of their spiritual advisers and religious teachers. And it is said that the fact that a testatrix leaves a large part of her estate to a church and to its rector may raise a presumption of undue influence

<sup>116</sup> *Parker v. Hill*, 85 Ark. 363, 108 S. W. 208; *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555; *Walker v. Shepard*, 210 Ill. 100, 71 N. E. 422; *Tomlinson v. Tomlinson*, 103 Iowa, 740, 72 N. W. 664; *Miller v. Worth*, 89 Neb. 75, 130 N. W. 846. And see, *supra*, § 46.

<sup>117</sup> *Irwin v. Sample*, 213 Ill. 160, 72 N. E. 687.

<sup>118</sup> *Zeigler v. Illinois Trust & Sav. Bank*, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127; *Kellogg v. Peddicord*, 181 Ill. 22, 54 N. E. 623; *Viallet v. Consolidated Ry. & Power Co.*, 30 Utah, 260, 84 Pac. 496, 5 L. R. A. (N. S.) 663; *Butler v. Gleason*, 214 Mass. 248, 101 N. E. 371. And see, *supra*, § 49.

<sup>119</sup> *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087; *Watson v. Holmes*, 80 Misc. Rep. 48, 140 N. Y. Supp. 727.



on the part of the rector, so as to cast on him the burden of rebutting the inference.<sup>120</sup>

But except in the few classes of cases mentioned above, the proof must always show the actual existence of the influence alleged to have been exerted. It has been said that the relationships of mistress and servant, patient and nurse, and aunt and nephew, even when all combined, do not raise a legal presumption of undue influence.<sup>121</sup> And the fact that the grantor lived in the grantee's family twenty years before the making of the deed, and continued to reside in the neighborhood does not show the existence of confidential relations,<sup>122</sup> nor is that fact to be inferred from the circumstance that one of the parties had been for several years a tenant in a building owned by the other.<sup>123</sup> So, a donor is not presumed to have been actuated by undue influence exercised in a confidential relation, from the mere fact that the donee in trust had formerly been employed by him as an agent to transact certain special business relating to the subject of the trust, and is entitled to commissions thereunder.<sup>124</sup> And there is no presumption of undue influence from the fact that a pauper who owned a homestead conveyed it to the county in consideration of being adequately supported thereafter during life.<sup>125</sup>

**§ 250. Dealings Between Attorney and Client.**—The relation between an attorney and his client is one of peculiar trust and confidence, and one which, the law presumes, invests the former with much influence over the latter. Hence in any business dealings between them which result in material advantage to the attorney or material detriment to the client, the burden is on the attorney to show the absence of any undue exercise of his influence, and that the client was given all the information and advice necessary

<sup>120</sup> *In re Hartlerode's Estate*, 183 Mich. 51, 148 N. W. 774. And see, *supra*, § 50.

<sup>121</sup> *Bade v. Feay*, 63 W. Va. 166, 61 S. E. 348.

<sup>122</sup> *McDonald v. Smith*, 95 Ark. 523, 130 S. W. 515.

<sup>123</sup> *Kline v. Hedges*, 229 Mo. 126, 129 S. W. 515.

<sup>124</sup> *Brown v. Mercantile Trust & Deposit Co.*, 87 Md. 377, 40 Atl. 256.

<sup>125</sup> *Scalf v. Collins County*, 80 Tex. 514, 16 S. W. 314.

to enable him to act understandingly.<sup>126</sup> But if these conditions are met, a transfer of property to one's legal adviser for value received is no more to be impeached than any other. In a case in New York, the plaintiff sought to set aside a conveyance of property which he had made to his attorney pending the relation between them, alleging fraud and undue influence. But it appeared that the conveyance was an absolute transfer, made in consideration of professional services rendered; that no fraud was intended by either party; that the attorney used no threats or coercion and made no misrepresentations; that the client had full knowledge of the situation and value of the property, and the attorney fully explained to him the nature and value of the services rendered, and the effect of the deed; that the client acted freely and voluntarily; and that a subsequent general and absolute release by the client to the attorney, executed in the presence of a third person, was given voluntarily, without fear or compulsion or the use of any fraud or deceit, and with full knowledge by the client of all the attorney's dealings with the property. And it was held that the conveyance should not be set aside.<sup>127</sup> In another case, it appeared that a father conveyed property to a favorite son, in whose family he had lived for several years, and that the chief inducement for the conveyance was his desire to reward that son's wife for the kindness with which she had cared for him in his old age. Though he was aged and infirm, his mental capacity was fully established, and it was shown that the deed was made in pursuance of his matured and deliberate purpose. The son was a lawyer and his father's legal adviser and agent in the transaction of his business at the time the conveyance was made. But it was held that this fact, together with the fact that the grantee immediately transferred the property to his wife, was not enough to prove the exertion of undue influ-

<sup>126</sup> *Thweatt v. Freeman*, 73 Ark. 575, 84 S. W. 720; *Faris v. Briscoe*, 78 Ill. App. 242; *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981; *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Marden v. Dorthy*, 12 App. Div. 176, 42 N. Y. Supp. 834; *Sheehan v. Erbe*, 77 App. Div. 176, 79 N. Y. Supp. 43. And see, *supra*, § 43.

<sup>127</sup> *Tragman v. Littlefield* (Com. Pl.) 18 N. Y. Supp. 583.

ence.<sup>128</sup> It is also to be noted that the presumption of an attorney's undue influence in case of a contract with his client does not apply where he openly assumes a hostile attitude to his client, nor to a contract creating the relation and fixing the attorney's compensation, as, in the latter case, the relation does not exist until the contract is made, and in agreeing on its terms the parties deal at arms' length.<sup>129</sup>

§ 251. **Dealings Between Husband and Wife.**—The rule was stated in an earlier chapter that the relation of husband and wife is held in law to be one of peculiar trust and confidence, that each owes to the other the duty of perfect fairness in any transaction between them, and that, while a contract between them is not presumptively fraudulent from the mere fact of their marital relation, yet if either complains of having been overreached, equity will scrutinize the matter with a jealous eye, and will seize upon any slight evidence of fraud or deceit or undue influence to annul the transaction.<sup>130</sup> But it cannot be annulled without some such evidence. There is no presumption that either of the parties is so far subject to the dictation and control of the other that any influence brought to bear in a matter of business or of property must necessarily be "undue" in the legal sense. It has been explicitly ruled that one is not dominant over his wife, as a matter of law, so as to create a presumption that any gift or grant which she makes to him results from undue influence, the question of his dominance being one of fact.<sup>131</sup> The mere opportunity to exercise a controlling influence is not enough to prove that it was in fact exerted, and whether it is the husband or the wife who is the donor or grantor, something more must be shown, to establish undue influence, than a mere disparity in their years, in their physical health and vigor, or in their mental capacity,—something, in fact, in the

<sup>128</sup> *Ball v. Ball*, 214 Ill. 255, 73 N. E. 314.

<sup>129</sup> *Cooley v. Miller & Lux*, 156 Cal. 510, 105 Pac. 981; *Etzel v. Duncan*, 112 Md. 346, 76 Atl. 493.

<sup>130</sup> *Supra*, § 47. And see *Jenne v. Marble*, 37 Mich. 319.

<sup>131</sup> *Mahan v. Schroeder*, 236 Ill. 392, 86 N. E. 97. And see *Manfredo v. Manfredo* (Ala.) 68 South. 157.

nature of fraud.<sup>182</sup> And even where it is shown that undue influence was exercised by a husband over his wife to induce her to sign a deed, not to himself but to a third person, this will not vitiate the transaction if the grantee did not instigate it and had no knowledge of it.<sup>183</sup>

§ 252. **Dealings Between Parent and Child.**—In the case of a gift or conveyance of property from parent to child or from child to parent, which is impeached as inequitable, the circumstances of the transaction should be carefully and vigilantly scrutinized by the court, in order to ascertain whether there has been any undue influence in procuring it. But there is nothing in the mere relation of the parties to make such a transfer constructively fraudulent, or to raise a presumption against its validity. On the contrary it will be presumed to be valid, and cannot be set aside without evidence that such influence was really existent and unduly exercised.<sup>184</sup> The fact that a transfer of property from a parent to his child was without material consideration and in the nature of a gift does not, alone and of itself, raise any presumption that it was procured by the exertion of undue influence, since, in the absence of any evidence to the contrary, the parent is presumably the dominant party, and not the one influenced or practised upon.<sup>185</sup> And further, influence founded upon gratitude, and gained by kindness and filial devotion, is not in any sense undue; and a parent has the legal right, by deed, to

<sup>182</sup> See *Donahoe v. Chicago Cricket Club*, 177 Ill. 351, 52 N. E. 351; *Nowlen v. Nowlen*, 122 Iowa, 541, 98 N. W. 383; *Phillips v. Chase*, 203 Mass. 556, 89 N. E. 1049, 30 L. R. A. (N. S.) 159, 17 Ann. Cas. 544; *Standeford v. Bates*, 2 Ky. Law Rep. 389.

<sup>183</sup> *Harper v. McGoogan*, 107 Ark. 10, 154 S. W. 187.

<sup>184</sup> *Towson v. Moore*, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; *Jenkins v. Pye*, 12 Pet. 241, 9 L. Ed. 1070; *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403; *Rader v. Rader*, 108 Minn. 139, 121 N. W. 393; *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177; *Broadus v. Monroe*, 13 Cal. App. 464, 110 Pac. 158; *Saufley v. Jackson*, 16 Tex. 584; *Purdy v. Watts*, 88 Conn. 214, 90 Atl. 936; *Soper v. Cisco* (N. J.) 95 Atl. 1016. Contra, see *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645. See, *supra*, § 45.

<sup>185</sup> *Neal v. Neal*, 155 Ala. 604, 47 South. 66; *Hemstreet v. Wheeler*, 100 Iowa, 282, 69 N. W. 518; *Wright's Ex'r v. Wright*, 32 Ky. Law Rep. 659, 106 S. W. 856; *Sappingfield v. Sappingfield*, 67 Or. 156, 135 Pac. 333.

bestow the whole of his property upon one favored child, and if substantial moral grounds for such partiality are shown to exist, such a gift will not be set aside in equity without the clearest and fullest proof of undue influence, imposition, or other fraud.<sup>136</sup> And even if the distribution which a parent makes of his property among his children appears unreasonable or unjust, or if those entitled to receive his bounty have not been equally remembered, this is not alone sufficient to show any incapacity on his part or the exercise of undue influence or duress over him by those most favored.<sup>137</sup> Even where a parent, old, infirm, and illiterate, strips himself of his entire fortune, to bestow it upon one of his children to the exclusion of all the rest, and so leaves himself entirely dependent on the charity of the donee, it does not necessarily follow that the transfer must be set aside. Such a case was before the courts in California, but the suit of the parent to vacate the transfer was denied, because it appeared affirmatively that the gift was made while she was in the possession of all her faculties, and with a full understanding of all the facts and of what the effect of the transaction would be, and in the execution of a purpose long entertained to reward the devotion and services of the donee, and that she was not the victim of any artifice, contrivance, or undue influence on his part.<sup>138</sup>

<sup>136</sup> *Kennedy v. Bates*, 142 Fed. 51, 73 C. C. A. 237. See, *supra*, § 243. The natural influence of a child over his parent is not undue influence avoiding a deed, unless so employed as to confuse the parent's judgment or control his will. *Alcorn v. Alcorn* (C. C.) 194 Fed. 275.

<sup>137</sup> *Russell v. Carpenter*, 153 Mich. 170, 116 N. W. 989; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158; *Hawthorne v. Jenkins*, 182 Ala. 255, 62 South. 505, Ann. Cas. 1915D, 707.

<sup>138</sup> *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910. In this case it was said: "The facts found do not warrant the court in ascribing the deed in question to undue influence. It is apparent, if the facts stated be true, and they must be so regarded, that the plaintiff was not the dupe of the defendant's artifices, the victim of his contrivances, or in any way subjected to his sway. The defendant's position was one of high trust and confidence, binding him, both by honor and in law, not only to abstain from anything like craft or guile, but to be generous and fair, and his conduct should be examined with the greatest scrutiny; but there is no rule which

Nevertheless, if undue influence is established by proof, the courts will just as readily grant relief in the case of a transfer from parent to child as in any other case. Such influence must ordinarily be shown by indirect and circumstantial evidence. But among the facts pertinent to be shown and tending to establish it are the following: That the parent was far advanced in age, and therefore more disposed to be compliant and yielding; that he was accustomed to rely upon the advice and grant the requests of the child to whom the property was given; that he was at the time in feeble health, or that his mental faculties were impaired; that he did not fully understand the nature of his act or its results in law; that he was cowed by threats or filled with anxiety by representations made to him; that he was wearied by continued importunity; that he was deprived of the benefit of independent advice, or excluded from the society of those who might have warned him in time; and that the grant was made without any consideration at all or upon a grossly inadequate consideration.<sup>189</sup>

A gift or grant from a child to its parent is regarded

creates a disability to take a bounty under the circumstances narrated. Transactions of the kind in question should be thoroughly sifted, but a voluntary deed, free from any imputation of undue influence, executed by a mother with her eyes open, cannot be set aside merely upon the ground that an honorable man would not accept a gift which strips his mother of all her property and leaves her dependent upon the charity of others. A person in possession of all his faculties has a right to dispose of all his property as he sees fit, upon the principle stated by Lord Nottingham,—that if he will improvidently bind himself up by a voluntary deed, he need not expect the court to break the fetters put upon himself by his own folly. To hold that gifts voluntarily made, and with full knowledge of all the facts and of the nature and effect of the transfer, should be set aside because the donor had divested himself of his property, would be to establish a rule that no man can make a voluntary disposition of his estate except by will."

<sup>189</sup> *Brummond v. Krause*, 8 N. D. 573, 80 N. W. 686; *Deem v. Phillips*, 5 W. Va. 168; *Boswell v. Boswell*, 20 Ky. Law Rep. 118, 45 S. W. 454; *Forrestel v. Forrestel*, 110 Iowa, 614, 81 N. W. 797; *Edwards v. Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372, 14 Atl. 621; *Soberanes v. Soberanes*, 97 Cal. 140, 31 Pac. 910; *Todd v. Grove*, 33 Md. 194; *Higberger v. Stiffler*, 21 Md. 352, 83 Am. Dec. 593; *Richards v. Donner*, 72 Cal. 207, 13 Pac. 584. But see *Marking v. Marking*, 106 Wis. 292, 82 N. W. 133.

somewhat differently, and particularly where the donor or grantor is very young and inexperienced, being still a minor or having recently attained majority. A transaction of this kind is sometimes denounced as *prima facie* fraudulent, and at any rate, it must, if impeached, be subjected to the severest scrutiny. It is a fair presumption that a young person so situated is very susceptible to the influence of a parent, and any exertion of that influence to the detriment of the child's interests would certainly be undue. A gift or grant so made may be sustained if founded on an adequate consideration, or if shown to be a proper family arrangement and for the best interests of the child. But if it appears to have been procured by the dominating influence of the parent, by the ascendancy of a strong mind over a weak will, by the exercise of parental command and authority, by threats or misrepresentations, or by any other sinister means, equity will not hesitate to set it aside, and will act the more readily if it appears that the child was without the benefit of competent and disinterested advice.<sup>140</sup>

There are some other domestic relations, analogous to those of parent and child, where the intimacy of the parties may give rise to a suspicion that a gift or grant was procured by undue influence, such, for instance, as the relation one may have with his grandchildren, or with a stepson, or a son-in-law. But there is no presumption of influence or of its unwarranted exercise growing merely out of a relation of this kind. It must first be shown that trust and confidence did actually exist, and to such a degree as might be expected between the closest of kin, and if this is established, then the same rules and the same presumptions will apply which are of weight in determining the question in case of a transfer between parent and child.<sup>141</sup>

<sup>140</sup> *Cooley v. Stringfellow*, 164 Ala. 460, 51 South. 321; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *Elghmy v. Brock*, 126 Iowa, 535, 102 N. W. 444; *Fritz v. Fritz*, 80 N. J. Eq. 56, 83 Atl. 181; *Lockhart v. Buckner*, 33 Ky. Law Rep. 678, 110 S. W. 850; *Jurgenson v. Dana*, 81 Misc. Rep. 431, 143 N. Y. Supp. 67; *Lane v. Reserve Trust Co.*, 30 Ohio Cir. Ct. R. 367.

<sup>141</sup> *Tipton v. Tipton*, 118 Tenn. 691, 104 S. W. 237; *Smith v. Lamb*, 87 Ark. 344, 112 S. W. 884; *Hoeb v. Maschinot*, 140 Ky. 330, 131 S. W. 23.



§ 253. **Burden of Proof and Evidence.**—Primarily, the person alleging that a contract, deed, gift, or will was procured through the exercise of undue influence has the burden of proving that fact.<sup>143</sup> But when the evidence shows the existence of confidential or fiduciary relations between the parties, or when it is certain from all the relations existing between them that they do not deal on equal terms, but that there is a superiority or dominance on one side, and the advantage of the bargain is on that side, then the burden of proof shifts, and it is incumbent on the party gaining the advantage to show affirmatively that the transaction between them was entered into fairly, openly, voluntarily, and with full understanding of the facts.<sup>143</sup> As to the particular facts to be shown, it is stated that a case of undue influence is made out when it is shown by clear and satisfactory evidence (1) that the person in question was subject to such influence, (2) that the opportunity to exercise it existed, (3) that there was a disposition to exercise it, and (4) that the result appears to be the effect of such influence.<sup>144</sup> The proof must be clear and convincing. A finding of undue influence cannot be rested on mere surmise or suspicion, nor on inferences drawn from inconsequential facts, but can be based only on material facts established and inferences which fairly and convincingly lead to the conclusion of undue influence.<sup>145</sup> Thus, the mere suspicion that because a son had the opportunity to advise his parents with respect to the disposition of their property, and the disposition made was to some extent in his

<sup>143</sup> Posey v. Donaldson, 189 Ala. 366, 66 South. 662; Killian v. Badgett, 27 Ark. 166; Britton v. Esson, 260 Ill. 273, 103 N. E. 218; Kellogg v. Peddicord, 181 Ill. 22, 54 N. E. 623; Appeal of Coombs, 112 Me. 445, 92 Atl. 515; Holmes v. Hill, 22 Neb. 425, 35 N. W. 206; Briggs v. Briggs (R. I.) 92 Atl. 571.

<sup>143</sup> Cowee v. Cornell, 75 N. Y. 91, 31 Am. Rep. 428; Ballouz v. Higgins, 61 W. Va. 68, 56 S. E. 184; Mors v. Peterson, 261 Ill. 532, 104 N. E. 216; Horner v. Bell, 102 Md. 435, 62 Atl. 736; Kensett v. Safe Deposit & Trust Co., 116 Md. 526, 82 Atl. 981; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087; Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997.

<sup>144</sup> In re Skrinsrud's Will, 158 Wis. 142, 147 N. W. 370.

<sup>145</sup> Hills v. Hart, 88 Conn. 394, 91 Atl. 257; Watson v. Holmes, 80 Misc. Rep. 48, 140 N. Y. Supp. 727.

favor, he procured the making of the conveyances, is not enough to warrant the conclusion that he exercised undue influence over them.<sup>146</sup> Again, it is not enough to show that the mind of the person in question was subject to the dominion or ascendancy of another mind, and was, in general, unduly subject to be influenced and controlled by that other. But such undue influence must be shown to have been exerted in the very act or transaction brought in question, and to have been the cause or inducement which brought it about.<sup>147</sup> In general, as bearing on the question of undue influence, the relationship of the parties to each other should be taken into consideration, as well as the conduct of the one to the other, the physical and mental condition of the person whose act is in question, and the character of the transaction.<sup>148</sup> Where the act impeached was a transfer of property purporting to be founded on a consideration given, the fact that the consideration was grossly inadequate, or that the result was very advantageous to one of the parties, may be put in evidence. It will not be conclusive, but it is relevant on the questions of mental capacity and undue influence.<sup>149</sup> But the fact that a deed recites a money consideration, in addition to the consideration of love and affection and of services rendered, whereas in fact no money was paid, is not sufficient to show undue influence, especially where the parties were ignorant as to what constitutes a valid consideration in law.<sup>150</sup> Again, the circumstance that a person, in disposing of all or the greater part of his property greatly favors one of his relations, excluding others who might be supposed to

<sup>146</sup> *Slaughter v. McManigal*, 138 Iowa, 643, 116 N. W. 726.

<sup>147</sup> *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620; *Brownfield v. Brownfield*, 43 Ill. 147. But in a case in Kentucky, where it appeared that the grantee in a deed was very assiduous in his attentions to the grantor, his aged father, and that his influence over him was considerable, and that he generally obtained whatever he wanted from his father, this was held sufficient to show undue influence. *McGuire v. McGuire*, 11 Bush (Ky.) 142.

<sup>148</sup> *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087; *McKissock v. Groom*, 148 Mo. 459, 50 S. W. 115.

<sup>149</sup> *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826; *Burroughs v. Jenkins*, 62 N. C. 33.

<sup>150</sup> *Nichols v. King*, 24 Ky. Law Rep. 124, 68 S. W. 133, 1114.

have equal claims upon him, may well raise a suspicion of undue influence, but is not sufficient by itself alone to prove such influence.<sup>151</sup> And the existence of meretricious relations between a testator and a person benefiting by his will, and the fact that the will is unnatural, do not alone establish undue influence, where there was no mental infirmity on the part of the testator and no proof of domination over him by the beneficiary.<sup>152</sup> And so, the fact that a contract by which a father gave the use of valuable property to one of his sons without compensation was drawn by an attorney other than the one preferred by the father does not warrant the conclusion of fraud or undue influence in the execution of the contract.<sup>153</sup>

<sup>151</sup> *Fitzpatrick v. Weber*, 168 Mo. 562, 68 S. W. 913. And see, *supra*, § 243.

<sup>152</sup> *In re Ewart's Estate*, 246 Pa. 579, 92 Atl. 708.

<sup>153</sup> *Wright's Ex'r v. Wright*, 32 Ky. Law Rep. 659, 106 S. W. 856.

## CHAPTER XI

## INSANITY AND INTOXICATION

- § 254. Insanity as Ground for Rescission.
- 255. Contracts and Deeds Voidable or Void.
- 256. Liability for Necessaries and Contracts Beneficial to Lunatic.
- 257. Notice or Knowledge of Insanity.
- 258. Same; Rights of Third Persons Purchasing for Value.
- 259. Effect of Adjudication of Insanity.
- 260. Time of Making Contract or Conveyance.
- 261. Deed or Contract Made in Lucid Interval.
- 262. Test of Mental Capacity.
- 263. Weakness of Intellect.
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- 265. Mental Weakness and Inadequacy of Consideration.
- 266. Monomania; Fixed Particular Delusions.
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- 276. Restitution or Restoration of Consideration.
- 277. Intoxication as Ground of Rescission.
- 278. Degree or Measure of Intoxication.
- 279. Intoxication Voluntary or Induced by Other Party.
- 280. Habitual Drunkenness.
- 281. Voidability of Contract; Ratification or Disaffirmance.
- 282. Restoration of Consideration.

§ 254. **Insanity as Ground for Rescission.**—In the case of an insane person,—that is, one who is wholly unable from mental derangement to make a binding contract,—the law presumes fraud from the relative condition of the parties, the presumption being stronger or weaker according to the position of the parties with respect to each other; and if the other party to the contract had notice or knowledge of the existing insanity, his action in concluding a bargain with the insane person, knowing the disability, constitutes a constructive fraud which authorizes the courts to grant relief, even though there was no actual fraud or un-

due influence.<sup>1</sup> But if the contracting party had no knowledge of the other's insanity, and dealt with him in entire innocence and good faith, and if, for this reason, the contract cannot be regarded as absolutely void but as voidable at most, still there remains the fact that an insane person cannot give that intelligent consent without which a valid contract cannot be formed, and hence, in this case also, the contract may be avoided or set aside on equitable terms. And the doctrine that where one of two innocent persons must suffer, the loss should fall on him who made the condition possible, has no application to cases where it is sought to set aside a deed on the ground of the insanity of the grantor, for an insane person cannot be held responsible for consequences which he could not understand or prevent.<sup>2</sup> It may be remarked in passing that the absurd doctrine of the early common law, that a person could not be permitted to allege his own mental incompetence because that would "stultify" him, has long since been discarded.<sup>3</sup>

A contract, deed, or other transaction being voidable for the insanity of one of the parties, that party himself may rescind it or sue for its rescission on being restored to sanity,<sup>4</sup> and is not chargeable with laches on account of his having acquiesced in the contract or failed to take measures against it during the continuance of his incompetency,<sup>5</sup> or for a reasonable length of time after the recovery of his reason.<sup>6</sup> If the insane person does not recover, or while his

<sup>1</sup> *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827. And see *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; *Combs v. Combs*, 23 Ky. Law Rep. 1264, 65 S. W. 13; *Austin v. Bridges*, 21 Ky. Law Rep. 694, 52 S. W. 966.

<sup>2</sup> *McKenzie v. Donnell*, 151 Mo. 461, 52 S. W. 222.

<sup>3</sup> "The earlier authorities of the English law held that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility; but such a doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened lawgiver. The maxim of the civil law, '*furiosus nullum negotium gerere potest, quia non intelligit quid agit*,' expresses the sense of modern jurisprudence on the subject." 1 Daniel, *Nego. Instr.* (3d edn.) § 209.

<sup>4</sup> *Patton v. Washington*, 54 Or. 479, 103 Pac. 60.

<sup>5</sup> *Alston v. Boyd*, 6 Humph. (Tenn.) 504.

<sup>6</sup> *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029.

incapacity still continues, rescission may be effected by his guardian or committee, if one has been appointed, or, where real property is involved, by his devisees or heirs at law.<sup>7</sup> But whoever it is that seeks to set aside a contract on the ground of insanity must assume the burden of proving the existence of that disability.<sup>8</sup>

If the transaction in question is regarded as absolutely void (and not merely voidable) on account of the insanity of a party, it may be that a court of law can afford the proper relief, and that there will be no necessity for asking the aid of equity. Thus, in Alabama, it is held that a deed made by a person who is completely and permanently deranged is entirely void, and if he is not in possession at the time of suit brought, those acting in his interest, or claiming title under him, cannot maintain a bill in equity for relief against the conveyance, since the law gives a complete and adequate remedy in the form of an action of ejectment.<sup>9</sup> But deeds so made are not universally regarded as absolutely void, and generally speaking, where a business transaction of any kind is to be avoided on the ground of insanity of a party, the court of equity is the proper forum to grant relief, on a bill for rescission or cancellation of the contract or the deed, as the case may be.<sup>10</sup> And one who takes a conveyance from a person whom he knows to be of unsound mind is not entitled to a tender of the price as a prerequisite to the avoidance of the instrument,<sup>11</sup> nor is it necessary that the bill for cancellation should contain an offer or allege a readiness to return the consideration received.<sup>12</sup> But incompetence by reason of insanity should be made the basis of a direct action for relief, and not of defense in a collateral

<sup>7</sup> *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735; *Young v. Blanchard*, 165 Mich. 340, 130 N. W. 694.

<sup>8</sup> *Wray v. Wray*, 32 Ind. 126.

<sup>9</sup> *Lewis v. Alston*, 184 Ala. 339, 63 South. 1008; *Boddie v. Bush*, 136 Ala. 560, 33 South. 826; *Letohatchie Baptist Church v. Bullock*, 133 Ala. 548, 32 South. 58; *Galloway v. Hendon*, 131 Ala. 280, 31 South. 603; *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 South. 578.

<sup>10</sup> *Luffboro v. Foster*, 92 Ala. 477, 9 South. 281; *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Logan v. Vanarsdall*, 27 Ky. Law Rep. 822, 86 S. W. 981.

<sup>11</sup> *Thrash v. Starbuck*, 145 Ind. 673, 44 N. E. 543.

<sup>12</sup> *Ronan v. Bluhm*, 173 Ill. 277, 50 N. E. 694.

proceeding. Thus, where a lunatic has given a conveyance of property, and his grantees have mortgaged it, and the committee of the lunatic has taken no steps to obtain a rescission of the conveyance, he cannot defeat the mortgage in an action brought to foreclose it.<sup>13</sup>

Applying these principles to various classes of transactions, it may be remarked in the first place that a deed, mortgage, or other conveyance made by an insane person may be set aside or canceled by decree of court, although it does not appear that any fraud or undue influence was exerted or that any unfair advantage was taken of his condition.<sup>14</sup> And an exchange of property to which one of the parties was a lunatic, or a person of obviously deranged mind, is invalid.<sup>15</sup> So, a promissory note made by a person who is insane is void in the hands of the original parties,<sup>16</sup> except, perhaps, where it was given for the reasonable value of necessities furnished to him or for another consideration, adequate in itself and beneficial to the insane person.<sup>17</sup> Also it is held that a note signed by an insane man, although negotiable in form, is not within the rule of commercial law which protects negotiable paper in the hands of a bona fide purchaser for value against defenses to which it was

<sup>13</sup> *German Sav. Bank v. Wagner*, 164 App. Div. 234, 149 N. Y. Supp. 654.

<sup>14</sup> *Maggini v. Pezzoni*, 76 Cal. 631, 18 Pac. 687; *Pinkard v. Smith*, Litt. Sel. Cas. (Ky.) 331; *Langley v. Langley*, 45 Ark. 392; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Dicken v. Johnson*, 7 Ga. 484; *Valpey v. Rea*, 130 Mass. 384; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Goodyear v. Adams*, 52 Hun, 612, 5 N. Y. Supp. 275; *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *New England L. & T. Co. v. Spitler*, 54 Kan. 560, 38 Pac. 799; *Curtis v. Brownell*, 42 Mich. 165, 3 N. W. 936; *Chew v. Bank of Baltimore*, 14 Md. 299; *Karrick v. Landon*, 41 App. D. C. 416. The deed of an insane grantor may be set aside even as against the objection that it was made with intent to defraud third persons. *Crawley v. Glaze*, 117 Va. 274, 84 S. E. 671.

<sup>15</sup> *Halley v. Troester*, 72 Mo. 73.

<sup>16</sup> *Allen v. Babcock*, 1 Har. (Del.) 348; *Ellars v. Mossbarger*, 9 Ill. App. 122; *Musselman v. Cravens*, 47 Ind. 1; *Taylor v. Dudley*, 5 Dana (Ky.) 308; *Schmidt v. Ittman*, 46 La. Ann. 888, 15 South. 310; *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Moore v. Hershey*, 90 Pa. 196.

<sup>17</sup> *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610.



subject in the hands of the payee, but the purchaser takes it charged with notice of the maker's disability, occupies no better position as against him than the payee, and is subject to the same burden of proof when the maker's incapacity is pleaded in defense to an action brought by the holder.<sup>18</sup> For similar reasons, the transfer of a promissory note by indorsement by an insane payee is voidable if not absolutely void, since it involves the making of a contract to which a lunatic cannot give a valid consent.<sup>19</sup> So, a contract by which an insane person assumes the liabilities of a surety is void, even though the other party had no knowledge of his insanity.<sup>20</sup> And a release of a claim for damages for a personal injury, obtained from the releasor while he was insane, is voidable, and he is not estopped from avoiding it by having accepted money under it.<sup>21</sup> Again, an insane person has no power to appoint an agent whose acts shall be binding upon him,<sup>22</sup> and the supervening insanity of a principal revokes the authority of his agent, except where the agency involves the grant of a power coupled with an interest, or where a valuable consideration has been given by a third person trusting to the apparent authority of the agent and in ignorance of the principal's insanity;<sup>23</sup> and

<sup>18</sup> *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Van Patton v. Beals*, 46 Iowa, 62; *McClain v. Davis*, 77 Ind. 419; *Moore v. Hershey*, 90 Pa. 196; *Wirebach v. First Nat. Bank*, 97 Pa. 543, 39 Am. Rep. 821; *Sentance v. Poole*, 3 Car. & P. 1. But see, per contra, *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Bank v. Sneed*, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788.

<sup>19</sup> *Walker v. Winn*, 142 Ala. 560, 39 South. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537; *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642; *Pittsburgh Nat. Bank v. Palmer*, 22 Pittsb. Leg. J. (O. S.) 189.

<sup>20</sup> *Edwards v. Davenport* (C. C.) 20 Fed. 756; *Van Patton v. Beals*, 46 Iowa, 62. But the insanity of a surety is no defense to his liability, where the note sued on was a renewal of a similar note imposing the same liability upon him, which he signed when sane. *Whitaker v. First Nat. Bank*, 163 Ky. 623, 174 S. W. 47.

<sup>21</sup> *Texas Pac. Ry. Co. v. Crow*, 3 Tex. Civ. App. 266, 22 S. W. 928.

<sup>22</sup> *Amos v. American Trust & Sav. Bank*, 125 Ill. App. 91.

<sup>23</sup> *Davis v. Lane*, 10 N. H. 156; *Matthlessen & Welchers Refining Co. v. McMahon*, 38 N. J. Law, 536; *Hill v. Day*, 34 N. J. Eq. 150; *Motley v. Head*, 43 Vt. 633; *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133.

conversely, when an agent becomes insane, it certainly gives ground for a rescission of the contract by which he was appointed, even if it does not ipso facto revoke his authority.<sup>24</sup> And again, where one undertakes to deal with an agent having a written power of attorney, and both he and the agent know that the principal is insane, the transaction thus effected has no greater weight than if it had been made directly with the insane principal himself.<sup>25</sup>

§ 255. **Contracts and Deeds Voidable or Void.**—In Alabama, it is firmly held that a deed, mortgage, or other conveyance made by a person who is permanently insane is not merely voidable, but is absolutely void for all purposes, and passes no title whatever to the grantee or mortgagee.<sup>26</sup> And this rule is likewise recognized in a few other states, a deed so made being held absolutely void, without regard to the adequacy of the consideration, and incapable of validation by being recorded.<sup>27</sup> But this doctrine is contrary to the immense preponderance of the authorities, the rule almost universally prevailing in modern times being that the contracts, as well as the deeds and conveyances of a person who is actually insane at the time, but not judicially so adjudged and not under guardianship, are voidable for that cause, on equitable principles, but not absolutely void.<sup>28</sup> Very important consequences follow from observ-

<sup>24</sup> Story, Agency, § 487.

<sup>25</sup> *Merritt v. Merritt*, 27 App. Div. 208, 50 N. Y. Supp. 604.

<sup>26</sup> *Boddle v. Bush*, 136 Ala. 560, 33 South. 826; *Dougherty v. Powe*, 127 Ala. 577, 30 South. 524; *Wilkinson v. Wilkinson*, 129 Ala. 279, 30 South. 578; *Galloway v. Hendon*, 131 Ala. 280, 31 South. 603; *Harris v. Jones*, 188 Ala. 633, 65 South. 956; *Lewis v. Alston*, 176 Ala. 271, 58 South. 278; *Birmingham Ry., Light & Power Co. v. Hinton*, 158 Ala. 470, 48 South. 546.

<sup>27</sup> *McEvoy v. Tucker* (Ark.) 171 S. W. 888; *Rogers v. Blackwell*, 49 Mich. 192, 13 N. W. 512; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 939; *Thompson v. Thomas*, 163 N. C. 500, 79 S. E. 896; *Bowman v. Wade*, 54 Or. 347, 103 Pac. 72; *Cason v. Cason*, 116 Tenn. 173, 93 S. W. 89.

<sup>28</sup> *Green v. Hulse*, 57 Colo. 238, 142 Pac. 416; *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; *Ratliff v. Baltzer's Adm'r*, 13 Idaho, 152, 89 Pac. 71; *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Somers v. Pumphrey*, 24 Ind. 231; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Ætna Life Ins. Co. v. Sellers*, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; *Downham v. Holloway*, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 830;

ing this distinction. For if the deed of an insane grantor is not void, but only voidable, it will suffice to vest the legal title in the grantee unless and until it shall be disaffirmed by the grantor or some one having authority to act for him or by his heirs, or set aside by decree of a court.<sup>29</sup> And it can be set aside only in an action brought directly for that purpose in a court of competent jurisdiction and on the specific ground of the insanity of the grantor.<sup>30</sup> And if such a deed is merely voidable, it will not be set aside except on equitable terms and conditions,<sup>31</sup> and only on a

*McMillan v. William Deering & Co.*, 139 Ind. 70, 38 N. E. 398; *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678; *Wilson v. Fahnestock*, 44 Ind. App. 35, 86 N. E. 1037; *Willis v. Mason*, 140 Ky. 88, 130 S. W. 964; *Dowell v. Dowell's Adm'r*, 137 Ky. 167, 125 S. W. 283; *Johnson's Committee v. Mitchell*, 146 Ky. 382, 142 S. W. 675; *Lexington & E. Ry. Co. v. Napier's Heirs*, 160 Ky. 579, 169 S. W. 1017; *Wathens v. Skaggs*, 161 Ky. 600, 171 S. W. 193; *Snowman v. Herrick*, 111 Me. 587, 90 Atl. 479; *Riley v. Carter*, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224; *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760; *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656; *Hill-Dodge Banking Co. v. Loomis*, 140 Mo. App. 62, 119 S. W. 967; *Robinson v. Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; *Blinn v. Schwarz*, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; *Hallohan v. Rempe*, 66 Misc. Rep. 27, 120 N. Y. Supp. 901; *Beeson v. Smith*, 149 N. C. 142, 62 S. E. 888; *Allred v. Smith*, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; *Williams v. Sapleha*, 94 Tex. 430, 61 S. W. 115; *Mitchell v. Inman* (Tex. Civ. App.) 156 S. W. 290; *Gulf, C. & S. F. Ry. Co. v. Stubbs* (Tex. Civ. App.) 166 S. W. 699; *Hancock v. Halle* (Tex. Civ. App.) 171 S. W. 1053; *French Lumbering Co. v. Theriault*, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856. And see *Ferguson v. Fitze* (Tex. Civ. App.) 173 S. W. 500. On this principle, when an incompetent person enters into an otherwise binding contract, it may be repudiated by him or his representative within a reasonable time, or otherwise it is affirmed. *Weber v. Bottger* (Iowa) 154 N. W. 579. But a person who is an idiot from his birth, and unable to read or write or to perform the simplest tasks, is entirely incompetent to contract and his contracts are void. *Ramirez v. Lasater* (Tex. Civ. App.) 174 S. W. 706.

<sup>29</sup> *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678.

<sup>30</sup> *Hallohan v. Rempe*, 66 Misc. Rep. 27, 120 N. Y. Supp. 901.

<sup>31</sup> *Hill-Dodge Banking Co. v. Loomis*, 140 Mo. App. 62, 119 S. W. 967.

showing that there was unfairness or injustice in the transaction, an inadequate consideration, or some fraudulent advantage taken of the grantor's incapacity.<sup>32</sup> But at the same time, if a sufficient case for cancellation is made out, a decree will not be withheld merely because it appears that the grantee did not know of the insanity of the grantor and obtained the conveyance without fraud and for an adequate consideration.<sup>33</sup>

**§ 256. Liability for Necessaries and Contracts Beneficial to Lunatic.**—Contracts made with insane persons to supply them with the necessaries of existence, or with things suitable to their condition and habits of life and therefore reasonably necessary for them, are not absolutely void, but at most voidable, if free from fraud or extortion, and the fair and reasonable value of articles furnished under such contracts (not necessarily the price agreed upon) should be paid by the insane persons or out of their estates; and the rule is the same where the law raises an implied contract from the furnishing and acceptance of such necessaries.<sup>34</sup> This rule is enacted by statute in some of the states, where it is provided that "a person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family."<sup>35</sup> And

<sup>32</sup> *Lexington & E. Ry. Co. v. Napier's Heirs*, 160 Ky. 579, 169 S. W. 1017.

<sup>33</sup> *Mitchell v. Inman* (Tex. Civ. App.) 156 S. W. 290.

<sup>34</sup> *Borum v. Bell*, 132 Ala. 85, 31 South. 454; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *State Commission in Lunacy v. Eldridge*, 7 Cal. App. 298, 94 Pac. 597, 600; *Ratliff v. Baltzer's Adm'r*, 13 Idaho, 152, 89 Pac. 71; *Fruitt v. Anderson*, 12 Ill. App. 421; *Palmer v. Hudson River State Hospital*, 10 Kan. App. 98, 61 Pac. 506; *Smith's Committee v. Forsythe*, 28 Ky. Law Rep. 1034, 90 S. W. 1075; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Gross v. Jones*, 89 Miss. 44, 42 South. 802; *Reando v. Misplay*, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; *Sceva v. True*, 53 N. H. 627; *Shaper v. Wing's Estate*, 2 Hun (N. Y.) 671; *Richardson v. Strong*, 35 N. C. 106, 55 Am. Dec. 430; *Kimball v. Bumgardner*, 16 Ohio Cir. Ct. R. 587; *Johnson v. Ballard*, 11 Rich. (S. C.) 178; *Hancock v. Haile* (Tex. Civ. App.) 171 S. W. 1053; *Stannard v. Burns' Adm'r*, 63 Vt. 244, 22 Atl. 460; *Sheltman v. Taylor's Committee*, 116 Va. 762, 82 S. E. 698.

<sup>35</sup> Civ. Code Cal., § 38; Rev. Civ. Code Mont., § 3595; Rev. Civ. Code N. Dak., § 4018; Rev. Civ. Code S. Dak., § 20; Rev. Laws Okl. 1910, § 888; Rev. Civ. Code Idaho, § 2606.

by an extension of this rule, when the promissory note of an insane person was given for necessities supplied to him, or for money used for the protection and benefit of his estate, furnished him in good faith and without knowledge of his insanity, it may be enforced to the extent of the value of the consideration so furnished.<sup>36</sup> In applying this rule, the term "necessaries" is not to be taken in too narrow a sense. It includes more than food, clothing, and shelter. It may cover the expense of legal proceedings which are necessary for the protection of the insane person himself or of his estate.<sup>37</sup> And so, a physician who renders necessary medical services to a lunatic or his family may recover a reasonable fee therefor.<sup>38</sup> And where a person has advanced money for the treatment of an insane married woman, whose husband was unable to provide medical care for her, on the credit of a bequest which he was informed would be made, and which afterwards was made, he may recover the advancement from the bequest.<sup>39</sup> And the property of an insane person, especially when in the custody of a court, will not be applied to the payment of his general indebtedness, as distinguished from claims for his present maintenance, until a sufficient fund is set aside for the support of the lunatic and his family.<sup>40</sup>

The tendency of the modern decisions is to broaden out the rule above stated, and to refuse rescission or cancella-

<sup>36</sup> *Hosler v. Beard*, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495. Contra, see *Davis v. Tarver*, 65 Ala. 98; *Milligan v. Pollard*, 112 Ala. 465, 20 South. 620.

<sup>37</sup> *In re Meares*, L. R. 10 Ch. Div. 582; *Williams v. Wentworth*, 5 Beav. 325; *Ferguson v. Filtze* (Tex. Civ. App.) 173 S. W. 500.

<sup>38</sup> *Smith's Committee v. Forsythe*, 28 Ky. Law Rep. 1034, 90 S. W. 1075. In the absence of any statute regulating the subject, an insane person cared for in a county insane asylum, having property, is liable to the county for board, care, and medical attention, as his relatives would be were he a pauper. See *Dandurand v. Kankakee County*, 196 Ill. 537, 63 N. E. 1011; *Simons v. Van Benthuyzen*, 121 Mich. 697, 80 N. W. 790; *Camden County v. Ritson*, 68 N. J. Law, 666, 54 Atl. 839; *McNairy County v. McCain*, 101 Tenn. 74, 45 S. W. 1070, 41 L. R. A. 862.

<sup>39</sup> *In re Renz*, 79 Mich. 216, 44 N. W. 598.

<sup>40</sup> *Lemly v. Ellis*, 146 N. C. 221, 59 S. E. 683.

tion of any ordinary contract or conveyance of an insane person, if it is shown to be fair, reasonable, based upon an adequate consideration, and beneficial to the afflicted person,<sup>41</sup> although, of course, inadequacy of consideration or any misrepresentations as to value of the subject-matter will be held fatal to such a contract.<sup>42</sup> Thus, if one enters into a contract with a lunatic without knowing of his mental condition, and in pursuance of the contract renders him important services, whereby he is greatly benefited, though the contract be voidable, yet the party rendering the services is entitled to just and reasonable compensation.<sup>43</sup> So, where the defendant, acting on the advice of counsel, borrowed money from the plaintiff which he prudently applied to the payment of liens on his estate, and in subsequent proceedings it was adjudged that he was a lunatic at the time when the loan was made, it was held that this was no defense in an action for the recovery of the money loaned.<sup>44</sup>

<sup>41</sup> *National Metal Edge Box Co. v. Vanderveer*, 85 Vt. 488, 82 Atl. 837, 42 L. R. A. (N. S.) 343, Ann. Cas. 1914D, 865; *Taylor v. Superior Court*, 30 R. I. 560, 76 Atl. 644. The learned author of Wharton on Contracts, after referring to the absurd rule of the common law, as enunciated by Lord Coke, that no man should be allowed to plead his own lunacy or imbecility because it would "stultify" him, and pointing out that the abandonment of this doctrine was followed by the general adoption of a rule equally indefensible and going to the other extreme, namely, that all contracts of a lunatic were void, pertinently remarks: "It is probable that nothing more was meant by this than that, when a man is transparently an idiot, no contract made by him will be enforced. It is certain that it was never meant that, when there is nothing in the conduct and appearance of a party to notify those dealing with him that he is insane, and when such parties have no notice of his insanity, their bargains with him, no matter how much they may be to his advantage, are void. That a person apparently sane, for instance, should lease a house and occupy it and then be protected from payment, the bargain having been fair and advantageous to him, or that, under similar circumstances he should buy goods and use them, and then be relieved from paying for them, never could have been intended. But in the rebound from the position of Coke, it was natural that expressions should be dropped to the effect that lunacy of all kinds should in all cases destroy capacity to contract." 1 Whart. Contr. § 100. But see *Bayne v. Stratton*, 131 Ky. 494, 115 S. W. 728.

<sup>42</sup> *Mathews v. Nash*, 151 Iowa, 125, 130 N. W. 796.

<sup>43</sup> *Ballard v. McKenna*, 4 Rich. Eq. (S. C.) 358; *Hallett v. Oakes*, 1 Oush. (Mass.) 296; *Blaisdell v. Holmes*, 48 Vt. 492.

<sup>44</sup> *Appeal of Kneedler*, 92 Pa. 428.



In another case, a suit was brought by a lunatic against her sister for the sale of real estate owned by them in common and to have the proceeds divided. The court, with knowledge of her condition, ordered the property sold, and it was bought by the sister. It was held that, as there was nothing in the record to show that the lunatic was prejudiced by the sale, the sister obtained a valid title which she could not rescind.<sup>45</sup> So again, this principle has been applied to cases in which a person, actually insane but not under guardianship, conveys his property in consideration of support and maintenance to be furnished him for life by the grantee. Such an agreement will be sustained and enforced if it is shown to have been made in good faith and without any fraud or any undue advantage taken of the mental weakness of the grantor, and if it appears further to be fair, reasonable, favorable to the insane person, and for his best interests.<sup>46</sup> And even where such a grant is set aside for inadequacy of consideration, the insane grantor can only recover the difference between the value of the care and support furnished and the value of the property transferred.<sup>47</sup>

**§ 257. Notice or Knowledge of Insanity.**—If one who makes a contract or receives a conveyance from an insane person has actual knowledge of such insanity, the bargain between them is at least constructively fraudulent and will be voidable for that reason,<sup>48</sup> and if it is set aside, the lunatic can be charged only with such benefits as he has actually received under it, or required to tender back only so much of the consideration paid him as may remain in his hands.<sup>49</sup> Thus, if the grantee in a deed knew that his

<sup>45</sup> *Willis v. Mason*, 140 Ky. 88, 130 S. W. 984.

<sup>46</sup> *Green v. Hulse*, 57 Colo. 238, 142 Pac. 416; *Dowell v. Dowell's Adm'r*, 137 Ky. 167, 125 S. W. 283; *Dunaway v. Dunaway*, 32 Ky. Law Rep. 29, 105 S. W. 137; *Kuhn's Trustee v. Clay*, 21 Ky. Law Rep. 1351, 55 S. W. 1.

<sup>47</sup> *Hancock v. Haile* (Tex. Civ. App.) 171 S. W. 1053.

<sup>48</sup> *Kent v. La Rue*, 136 Iowa, 113, 113 N. W. 547; *Sander v. Savage*, 75 App. Div. 333, 78 N. Y. Supp. 189; *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157; *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Jefferson v. Rust*, 149 Iowa, 594, 128 N. W. 954.

<sup>49</sup> *Creekmore v. Baxter*, 121 N. C. 31, 27 S. E. 994; *Jefferson v. Rust*, 149 Iowa, 594, 128 N. W. 954.



grantor was insane, and took advantage of it to obtain the property for a greatly inadequate consideration, his conduct is tortious and fraudulent and the deed is void.<sup>50</sup> But knowledge of insanity or the want of such knowledge is not the sole test of the validity of such a transaction. The mere fact that one dealing with a lunatic was ignorant of his mental condition is not alone sufficient to make the contract binding on the lunatic or prevent its rescission.<sup>51</sup> There are other things to be considered, and particularly the adequacy of the consideration given, the fairness of the bargain, and the possibility or impossibility of restoring the parties to their original situation on rescission of the contract. The generally accepted rule is that a contract entered into by a person apparently sane, or not conspicuously wanting in intelligence, before the fact of his insanity has been judicially established, is at most only voidable, and will not be set aside where the other party to be affected by the decree of the court had no notice of the fact of the insanity, and has derived no inequitable advantage from the transaction, and where the parties cannot be placed in statu quo.<sup>52</sup> Thus, the deed of a person non compos mentis will not be set aside where he talked sensibly at the time it was made, and had the benefit of advice from competent counsel, and the grantee did not know that his grantor was of unsound mind, and the grantor received benefits under the deed, and the status quo cannot now be restored.<sup>53</sup>

Knowledge of a person's insanity may be constructive as well as actual. Generally the cases hold that the contract is voidable if the unsettled condition of the person's mind would be apparent to any one talking with him and dealing with him, or if the facts and circumstances known to the

<sup>50</sup> *Sander v. Savage*, 75 App. Div. 333, 78 N. Y. Supp. 189.

<sup>51</sup> *Woolley v. Gaines*, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; *Orr v. Equitable Mortg. Co.*, 107 Ga. 499, 33 S. E. 708; *Campbell v. Campbell*, 35 R. I. 211, 85 Atl. 930.

<sup>52</sup> *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Wiser v. Clinton*, 82 Conn. 148, 72 Atl. 928, 135 Am. St. Rep. 264; *Goldberg v. West End Homestead Co.*, 78 N. J. Law, 70, 73 Atl. 128; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *McMillan v. William Deering & Co.*, 139 Ind. 70, 38 N. E. 398. And see, *infra*, § 275.

<sup>53</sup> *Greeno v. Ellas*, 1 Tenn. Ch. App. 165.

party contracting with him would lead an ordinarily prudent and observant man to believe him insane, or even would put such a man upon inquiry by which, if reasonably careful, he might have learned the truth.<sup>54</sup> But where, for instance, no direct interview is had with the insane person, but the business is conducted by correspondence, his letters being apparently sane and sensible, knowledge of the fact that he was an "invalid" is not constructive notice that he was insane nor a fact which should lead to an inquiry.<sup>55</sup> So a deed will not be set aside on account of the insanity of one of the grantors (the sister of the other grantor) when the grantee had no reason to suspect that she might be insane, and did not see her, and where she had been treated as sane by the members of her family in other business transactions.<sup>56</sup> It should be observed that the statute law of Louisiana provides that, where there has been no interdiction, a contract will not be void on the ground of insanity unless the party is "notoriously" insane. And it is held that the evidence of five witnesses that a man is of feeble intellect, contradicted by that of seven witnesses, there being no evidence that the purchaser knew of the vendor's incapacity, is not sufficient evidence of notorious insanity to justify the avoidance of the contract.<sup>57</sup>

§ 258. **Same; Rights of Third Persons Purchasing for Value.**—In a few cases it has been decided that the deed of an insane grantor is voidable even though the land conveyed may have come into the possession of a third person who purchased for full value and without notice of the mental infirmity of the grantor on account of whose insanity the deed is assailed; for persons are affected with constructive notice of the incapacity to convey of those through whom they claim title.<sup>58</sup> But the uncertainty as to titles which

<sup>54</sup> *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthiessen & Welchers Refining Co. v. McMahon*, 38 N. J. Law, 536; *Halley v. Troester*, 72 Mo. 73.

<sup>55</sup> *Groff v. Stitzer*, 77 N. J. Eq. 260, 77 Atl. 46.

<sup>56</sup> *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000.

<sup>57</sup> *Martinez v. Moll* (C. O.) 46 Fed. 724.

<sup>58</sup> *Gray v. Turley*, 110 Ind. 254, 11 N. E. 40; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *Somers v. Pumphrey*, 24 Ind. 231; *Dewey*

would result from the general application of this doctrine seems to furnish good ground for challenging its validity as a matter of public policy, if not of strict law. The better reason seems to be with the decisions which hold that, where a grantor who is in fact insane but has not been judicially so declared conveys his land to a grantee (even though the latter knows of the insanity), and that grantee in turn conveys to a third person, who pays value and who is ignorant of the insanity, such third person is entitled to the protection of a bona fide purchaser, and the deed of the insane grantor should not be set aside as against him.<sup>59</sup> But of course, in such cases, some remedy should be available in favor of the insane grantor, especially if he was defrauded or overreached in the original transaction. And it is held that, where a purchaser of land from an insane person obtains the property for much less than its value, and then sells it for a higher price to a bona fide purchaser, the original purchaser will be regarded as a trustee of the land and of the proceeds thereof for the benefit of the vendor, and will therefore be accountable for any profit made on the sale,<sup>60</sup> or, according to some of the authorities, he is liable to the guardian of the insane person in an action for damages.<sup>61</sup>

**§ 259. Effect of Adjudication of Insanity.**—A judicial determination that a given person is insane, when reached in a direct proceeding for that purpose, such as an inquisition of lunacy or other appropriate proceeding, is not only a judgment in rem, such as to give constructive notice of the fact to all the world, but also it raises a conclusive presumption that the person is incompetent to enter into any

v. Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; McKenzie v. Donnell, 151 Mo. 461, 52 S. W. 222.

<sup>59</sup> Davis Sewing Machine Co. v. Barnard, 43 Mich. 379, 5 N. W. 411; Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1066; Campbell v. Kerrick, 142 Ky. 279, 134 S. W. 186; Bevins v. Lowe, 159 Ky. 439, 167 S. W. 422; Johnson's Committee v. Mitchell, 146 Ky. 382, 142 S. W. 675; Arnett's Committee v. Owens, 23 Ky. Law Rep. 1409, 65 S. W. 151.

<sup>60</sup> De Vries v. Crofoot, 148 Mich. 183, 111 N. W. 775; Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827.

<sup>61</sup> Pyle v. Pyle (Tex. Civ. App.) 150 S. W. 488.

binding contract or make a valid deed.<sup>62</sup> Hence, for instance, a bank will be liable in paying a check of a person who has lawfully been adjudged insane, although that fact was unknown to the bank, and although the adjudication of insanity was made in another state.<sup>63</sup> Hence, according to the rule generally prevailing, contracts made by a person after inquisition, or after he has formally been adjudged insane, are absolutely void; while those made before such inquisition or judgment are only voidable. In the former case, they are incapable of ratification or of any legal effect whatever. But in the latter case, they may be set aside if it is shown that the other party had knowledge or notice of the fact of insanity, or that there was fraud, imposition, or any unfairness, or inadequacy of consideration, but if fair, such contracts should be vacated only on just and equitable terms.<sup>64</sup> These principles have been enacted in the codes of some of the western states, by providing that "a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission," but that "after his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration is judicially determined."<sup>65</sup>

<sup>62</sup> *Abernathie v. Rich*, 229 Ill. 412, 82 N. E. 308; *Brauer v. Lawrence*, 165 App. Div. 8, 150 N. Y. Supp. 497; *Godwin v. Parker*, 152 N. C. 672, 68 S. E. 208.

<sup>63</sup> *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

<sup>64</sup> *Wilder v. Weakley's Estate*, 34 Ind. 181; *Musselman v. Cravens*, 47 Ind. 1; *McClain v. Davis*, 77 Ind. 419; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Succession of Smith*, 12 La. Ann. 24; *Fecel v. Guinault*, 32 La. Ann. 91; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Jackson v. Gumaer*, 2 Cow. (N. Y.) 552; *Person v. Warren*, 14 Barb. (N. Y.) 488; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Ipock v. Atlantic & N. C. R. Co.*, 158 N. C. 445, 74 S. E. 352; *Wilson v. Fahnestock*, 44 Ind. App. 35, 86 N. E. 1037.

<sup>65</sup> Civ. Code Cal., §§ 38, 39; Rev. Civ. Code Mont., § 3596; Rev. Civ. Code N. Dak., §§ 4019, 4020; Rev. Civ. Code S. Dak., §§ 21, 22; Rev. Laws Okl. 1910, §§ 889, 890; Rev. Civ. Code Idaho, § 2607. And see *San Francisco Credit Clearing House v. MacDonald*, 18 Cal. App. 212, 122 Pac. 964; *Castro v. Gell*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 88.

Where the local practice is such that the finding upon an inquisition of lunacy is merely that the subject was insane on and after a given date,—as, the date of filing the petition,—there is no presumption of law as to his sanity or insanity prior to that date; but a contract made with him before the institution of the proceedings may be avoided on evidence that he was actually insane when it was made.<sup>66</sup> And where an inquisition in lunacy is shown by the record to have been set aside, a title thereafter given to real estate by the lunatic is valid, although the inquisition is subsequently reinstated.<sup>67</sup> There are also decisions to the effect that, although a person may have been adjudged insane, yet if no conservator or guardian has been appointed, and he is in the management of his affairs, and there is nothing about his appearance or manner to indicate his incapacity to contract, if he purchases an article at a fair and reasonable price, which is necessary or useful to him in his business, the seller having no notice of his having been adjudged insane, he will be liable to pay the price agreed on.<sup>68</sup> As to the effect of a subsequent restoration to reason, the rule in the code states (above referred to) is that the incapacity to contract continues “until his restoration is judicially determined.” But elsewhere a conveyance made by one formerly adjudged a lunatic, but who is in fact sane when it is made, is valid, although no adjudication has been made that he had been restored to his right mind.<sup>69</sup> And if, at the time of making a deed of his property, one under guardianship as a lunatic was in fact of sound mind, and the guardianship had been practically abandoned, and the contract was fair, the deed will be held valid, although the guardian had not been formally discharged.<sup>70</sup>

<sup>66</sup> *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123. But see *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573.

<sup>67</sup> *Mitchell v. Spaulding*, 206 Pa. 220, 55 Atl. 968.

<sup>68</sup> *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610. And see *Wray v. Ohandler*, 64 Ind. 146; *Copenrath v. Klenby*, 83 Ind. 18; *Dodds v. Wilson*, 3 Brev. (S. C.) 389; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196.

<sup>69</sup> *Lower v. Schumacher*, 61 Kan. 625, 60 Pac. 538.

<sup>70</sup> *Thorpe v. Hanscom*, 64 Minn. 201, 66 N. W. 1.

§ 260. **Time of Making Contract or Conveyance.**—To render a contract voidable on account of the mental incapacity of one of the parties to it, it is not enough to show that such party was at times, from whatever cause, lacking in sufficient sanity to understand what he was doing, but the evidence of his defective intelligence must relate to the immediate time of making the contract.<sup>71</sup> A deed of real estate executed by one who was, at the time, suffering from a temporary mental aberration, will be set aside, though it is shown that he was sane before and afterwards.<sup>72</sup> As to conveyances of real estate, it is generally held that the date of the execution of the deed is the material point of time to be considered upon an inquiry as to the grantor's mental capacity,<sup>73</sup> though, in a case in New York, where there was no proof of delivery of a deed at the time of its execution, but a presumption of delivery from the fact of its being recorded two years afterwards, it was held that the issue of the grantor's mental competency, as relating to delivery, was to be determined as of the time of the recording.<sup>74</sup> It should be observed that the subsequent insanity of a party does not annul his contract made when sane,<sup>75</sup> except in cases where the contract remains entirely executory, in which event it may be revoked by the supervening insanity.<sup>76</sup> But if one, when sane, makes an agreement upon sufficient consideration to execute a mortgage, which is executed accordingly, but at a time when he is insane, equity may in a proper case apply the rule that it may treat that as done which ought to have been done, and not allow the mortgage to be avoided by the plea of insanity at the time of its execution.<sup>77</sup> So, deeds executed by

<sup>71</sup> *T. M. Gilmore & Co. v. W. B. Samuels & Co.*, 135 Ky. 706, 123 S. W. 271, 21 Ann. Cas. 611; *Armstrong v. Burt* (Tex. Civ. App.) 138 S. W. 172.

<sup>72</sup> *Fisher v. Fisher*, 12 Neb. 416, 11 N. W. 864.

<sup>73</sup> *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140.

<sup>74</sup> *Ford v. Gale*, 155 App. Div. 675, 140 N. Y. Supp. 541.

<sup>75</sup> *Sands v. Potter*, 59 Ill. App. 206.

<sup>76</sup> *Beach v. First M. E. Church*, 96 Ill. 177.

<sup>77</sup> *Bevin v. Powell*, 11 Mo. App. 216.

a father to his sons, accomplishing the same result which was achieved by his executing a will six years before, when no doubt existed as to his mental condition, will not be set aside for lack of mental capacity of the grantor following an attack of paralysis.<sup>78</sup>

§ 261. **Deed or Contract Made in Lucid Interval.**—A deed or other conveyance or a contract made by an insane person, but during a lucid interval, is valid and enforceable.<sup>79</sup> A "lucid interval," as the term is used in medical jurisprudence, is an interval occurring in the mental life of an insane person during which he is completely restored to the use of his reason, or so far restored that he has sufficient intelligence, judgment, and will to enter into contractual relations, or perform other legal acts, without disqualification by reason of his disease. But the term means something more than a mere lull in the progress of the mental disease, an apparent tranquillity or seeming repose, or a mere remission or temporary abatement of the external manifestations of insanity or of the excited or violent symptoms of the disease. It must be in the nature of a temporary cure, an intermission so clearly marked as perfectly to resemble a return of mental health, a restoration of the faculties of the mind, temporary, it is true, and not necessarily complete, but such as to enable the patient without doubt to comprehend and perform a legal act with such a measure of reason, memory, and judgment as is normal to him.<sup>80</sup> For instance, one whose mind is so permanently impaired that he cannot act rationally can make no valid contract, and it is immaterial that at the precise time he does

<sup>78</sup> *Taphorn v. Taphorn*, 32 Ohio Cir. Ct. R. 96.

<sup>79</sup> *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187; *Stitzel v. Farley*, 148 Ill. App. 635; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Lilly v. Waggoner*, 27 Ill. 395; *Berkey v. Rensberger*, 49 Ind. App. 226, 96 N. E. 32; *Ramsdell v. Ramsdell*, 128 Mich. 110, 87 N. W. 81; *In re Gangwere's Estate*, 14 Pa. 417, 53 Am. Dec. 554; *Porter v. Brooks* (Tex. Civ. App.) 159 S. W. 192; *Beverage's Committee v. Ralston*, 98 Va. 625, 37 S. E. 283; *McPeck's Heirs v. Graham's Heirs*, 56 W. Va. 200, 49 S. E. 125.

<sup>80</sup> *Frazer v. Frazer*, 2 Del. Ch. 260; *Godden v. Burke's Ex'rs*, 35 La. Ann. 160; *Ricketts v. Joliff*, 62 Miss. 440; *Ekin's Heirs v. McCracken*, 11 Phila. (Pa.) 534.



not show any aberration.<sup>81</sup> Lucid intervals, in the legal sense, are therefore not to be looked for in any of the forms of permanent and complete insanity. There is, for instance, a type which is called "maniacal-depressive insanity," and which is characterized by alternating periods of high maniacal excitement and of depressed and stuporous conditions in the nature of or resembling melancholia, often recurring as a series or cycle of isolated attacks, with more or less complete restoration to health in the intervals. These intervals might perhaps be "lucid," but it would require strong evidence to show that the afflicted person, at such a time, possessed sufficient understanding and judgment to satisfy the requirements of the law. On the other hand, it has been said that one affected by a progressive mental disorder, such as softening of the brain, may well have periods of complete comprehension and understanding of transactions, especially where such transactions are not of a complicated character.<sup>82</sup> And this is true of various forms of "recurrent insanity," where the mental disorder returns from time to time, but is not continuous, or where the attacks are fitful, exceptional, or occasional.<sup>83</sup> So again, while the paroxysms of epilepsy are often accompanied by complete mental alienation, amounting in some cases to acute mania, yet, at least in the earlier stages of the disease, there is usually a complete restoration to reason in the intervals between the attacks.<sup>84</sup> An illustrative case is found in Virginia, where one who had been discharged from an insane asylum as "improved," and who thereafter between insane intervals, lasting from two days to two weeks, was quiet and inoffensive, and worked with efficiency, read, voted, and was regarded as having sufficient mental capacity to convey by deed, was held to be capable during his lucid intervals of making a binding contract.<sup>85</sup>

<sup>81</sup> *Searles v. Northwestern Mut. Life Ins. Co.*, 148 Iowa, 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405.

<sup>82</sup> *Critchfield v. Easterday*, 26 App. D. C. 89.

<sup>83</sup> *Leache v. State*, 22 Tex. App. 279, 3 S. W. 538, 58 Am. Rep. 638.

<sup>84</sup> *Aurentz v. Anderson*, 3 Pittsb. (Pa.) 310; *Brown v. Riggen*, 94 Ill. 560.

<sup>85</sup> *Reed v. Reed*, 108 Va. 790, 62 S. E. 792.

§ 262. **Test of Mental Capacity.**—No particular degree of mental capacity is essential to enable one to execute a valid deed or contract, and no arbitrary standard is or could be established. No very high measure of intelligence or acumen is required, and on the other hand, a person may be mentally incompetent for business and legal purposes although he is not absolutely an idiot nor totally devoid of reason. The test generally agreed upon is this: A deed or contract cannot be set aside on the ground of insanity if the person had sufficient mental capacity to understand in a reasonable manner the nature of the particular transaction in which he was engaged and its consequences and effects upon his rights and interests.<sup>86</sup> It is sometimes said that a

<sup>86</sup> *Frederic v. Wilkins*, 182 Ala. 343, 62 South. 518; *McEvoy v. Tucker* (Ark.) 171 S. W. 888; *Green v. Hulse*, 57 Colo. 238, 142 Pac. 416; *Smith v. Smith*, 29 App. D. C. 408; *De Nieff v. Howell*, 138 Ga. 248, 75 S. E. 202; *Dunn v. Evans*, 139 Ga. 741, 78 S. E. 122; *Barlow v. Strange*, 120 Ga. 1015, 48 S. E. 344; *Richardson v. Adams*, 110 Ga. 425, 35 S. E. 648; *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45; *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *Beaty v. Hood*, 229 Ill. 562, 82 N. E. 350; *Fitzgerald v. Allen*, 240 Ill. 80, 88 N. E. 240; *Kelly v. Nussbaum*, 244 Ill. 158, 91 N. E. 72; *Johnson v. Watson*, 169 Ill. App. 218; *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815; *Mark v. North*, 155 Ind. 575, 57 N. E. 902; *Swartwood v. Chance*, 131 Iowa, 714, 109 N. W. 297; *Ellwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 740; *Nowlen v. Nowlen*, 122 Iowa, 541, 98 N. W. 383; *Wathens v. Skaggs*, 161 Ky. 600, 171 S. W. 193; *Lassiter's Adm'r v. Lassiter's Ex'r*, 23 Ky. Law Rep. 481, 63 S. W. 477; *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; *Bannon v. P. Bannon Sewer Pipe Co.*, 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Garner v. Garner*, 4 Ky. Law Rep. 823; *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227; *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357; *Soper v. Cisco* (N. J.) 95 Atl. 1016; *Blakeley v. Blakeley*, 33 N. J. Eq. 502; *Lozear v. Shields*, 23 N. J. Eq. 509; *Hoey v. Hoey*, 53 App. Div. 208, 65 N. Y. Supp. 778; *Jones v. Jones*, 63 Hun, 630, 17 N. Y. Supp. 905; *Wessell v. Rathjohn*, 89 N. C. 377, 45 Am. Rep. 696; *Pepple v. Pepple*, 13 Ohio Cir. Ct. R. 43; *Kime v. Addlesperger*, 24 Ohio Cir. Ct. R. 397; *Miller v. Folsom* (Okla.) 149 Pac. 1185; *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039; *Wade v. Northup*, 70 Or. 569, 140 Pac. 451; *Mansfield v. Hill*, 56 Or. 400, 107 Pac. 471, 108 Pac. 1007; *Central Bank & Trust Co. v. Wiess* (Tex. Civ. App.) 170 S. W. 820; *Uecker v. Zuercher*, 54 Tex. Civ. App. 289, 118 S. W. 149; *Cox v. Combs*, 51 Tex. Civ. App. 346, 111 S. W. 1069; *Caddell v. Caddell* (Tex. Civ. App.) 131 S. W. 432; *Smith v. Guerre* (Tex. Civ. App.) 175 S. W. 1093; *Stringfellow v. Hanson*, 25 Utah, 480, 71 Pac. 1052; *Hatch v. Hatch* (Utah) 148 Pac. 433; *Day v. Seely*, 17 Vt. 542; *Stewart v.*

person has capacity to make a deed if he has sufficient mind to be capable of transacting ordinary business affairs, or of pursuing his own ordinary business in his usual manner.<sup>87</sup> But this is too loose. The proper inquiry is whether he was capable of understanding and appreciating the nature and effect of the one particular act or transaction which is challenged. "It is evident that it requires less capacity to do a simple act, or make a contract involving no complications, than it does to make understandingly an agreement involving complications and imposing various obligations. One may have but little business capacity, and a weak intellect or impaired faculties, and yet be capable of making a binding contract. All that the law requires to make the contract effectual is that a man should so have possession of his reason as to know the character of the act he is about to perform and be capable of carrying that act into effect."<sup>88</sup>

When we speak of understanding the nature of the transaction engaged in, it is meant that the person in question should be capable of comprehending, for instance, the difference between a deed and a mortgage, or between a bond and a promissory note, and, in the case of a conveyance, what property he is dealing with and what disposition he is about to make of it. If the effect of the instrument as a conveyance of property is understood, it is not necessary that he should have the ability to understand the legal effect of the words employed.<sup>89</sup> But contractual capacity cannot be predicated of a person whose mind and memory are so impaired that he cannot understand the nature of the property being dealt with, nor his relation to it or power over it, and that he is incapable of recognizing facts as to its previous disposition which should be within his own knowl-

Flint, 59 Vt. 144, 8 Atl. 801; *Allen's Adm'rs v. Allen's Adm'rs*, 79 Vt. 173, 64 Atl. 1110; *Slafter v. Savage* (Vt.) 95 Atl. 790; *Wampler v. Harrell*, 112 Va. 635, 72 S. E. 135; *Teter v. Teter*, 59 W. Va. 449, 53 S. E. 779.

<sup>87</sup> *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881; *King v. Humphreys*, 138 Pa. 310, 22 Atl. 19.

<sup>88</sup> *Moore v. Gilbert*, 175 Fed. 1, 99 C. C. A. 141. And see *Nelson v. Thompson*, 16 N. D. 295, 112 N. W. 1058; *Smith v. Smith*, 29 App. D. C. 408.

<sup>89</sup> *Moorhead v. Scovel*, 210 Pa. 446, 60 Atl. 13; *Fitzgerald v. Tvedt*, 142 Iowa, 40, 120 N. W. 465.

edge,<sup>90</sup> nor of a grantor whose mind is so weak that he has no intelligent conception of the quantity or quality of the land he is about to convey, cannot count money, and does not know whether ten dollars is more or less than a hundred dollars.<sup>91</sup> On the other hand, it goes far to show sufficient mental capacity if a grantor, when about to sign the deed, inquired whether or not a former deed had been placed on record, and expressed concern lest he should be placed in an awkward position on account of it.<sup>92</sup>

Again, the person whose sanity is questioned should be able to understand the consequences and effects of what he is doing. Thus, if one transfers all or the greater part of his property to one of his children, he should be able to understand that the gift is irrevocable and will make him dependent upon the charity or dutifulness of the grantee,<sup>93</sup> or that it will deprive his other children of their equal shares in the distribution of his estate,<sup>94</sup> and if he cannot grasp these facts, it cannot be said that he has mental capacity to make the deed. But a grantor has sufficient mental capacity to execute a valid deed if, at the time it was made, he understood the business in which he was engaged, knew the extent and value of the property, and how he wanted to dispose of it, and was able to keep such facts in his mind long enough to plan and effect the conveyance without prompting or interference from others.<sup>95</sup> And to sustain a deed of gift disposing of the bulk of a large estate, if the grantor has the capacity to understand what he is doing, it is not necessary that he should have actual knowledge or remembrance of the extent, character, and location of each piece of real estate or kind of personal property which he possesses, nor that he should remember all his collateral relatives and their claims upon his bounty, and be able to give their names and addresses.<sup>96</sup>

<sup>90</sup> *Hammell v. Hyatt*, 59 N. J. Eq. 174, 44 Atl. 953.

<sup>91</sup> *Paulter v. Manuel*, 25 Okl. 59, 108 Pac. 749.

<sup>92</sup> *Cutts v. Young*, 147 Mo. 587, 49 S. W. 548.

<sup>93</sup> *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928.

<sup>94</sup> *Dean v. Dean*, 42 Or. 290, 70 Pac. 1039.

<sup>95</sup> *Hayman v. Wakeham*, 133 Mich. 363, 94 N. W. 1062; *Terry v. Terry*, 170 Mich. 330, 136 N. W. 448.

<sup>96</sup> *Bowdoin College v. Merritt* (C. O.) 75 Fed. 480.

Further, a person cannot be said to be capable of giving an intelligent assent to a transaction unless he has the mental ability to exercise some measure of judgment and will in relation to it.<sup>97</sup> If his mind is so far a blank that he will register automatically the wishes of another, it is clear that he does not possess the requisite degree of intelligence. He must be able to decide intelligently whether or not he desires to do the particular thing which is before him.<sup>98</sup> This does not mean that he should be able to act wisely or discreetly, that he should possess shrewdness, or that he should be able to drive a good bargain.<sup>99</sup> But at least he must be able to exercise some judgment as to whether he will be benefited or injured by the act in question, or, as otherwise stated, he must be able to understand and protect his own interests in dealing with his property.<sup>100</sup> And indeed it has been said, in one of the cases on the subject, that, while one may have the mental capacity to execute a deed as a gift to a child in consideration of love and affection, if he can understand his ordinary business and what disposition he is making of his property, yet, to have sufficient capacity to make a valid deed on a sale of the property, he must possess sufficient mental strength to judge of values and successfully to oppose fraud and undue influence.<sup>101</sup>

The proposition that it requires a greater degree of mental capacity to make a valid deed or contract than it does to make a valid will has been affirmed in some of the authorities and denied in others.<sup>102</sup> The truth is that any such

<sup>97</sup> *Farmers' State Bank v. Farmer* (Tex. Civ. App.) 157 S. W. 283; *Paulus v. Reed*, 121 Iowa, 224, 96 N. W. 757.

<sup>98</sup> *Mann v. Keene Guaranty Sav. Bank*, 86 Fed. 51, 29 C. C. A. 547; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Hacker v. Hoover*, 89 Neb. 317, 131 N. W. 734; *Brugman v. Brugman*, 93 Neb. 408, 140 N. W. 781.

<sup>99</sup> *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140.

<sup>100</sup> *Beaty v. Hood*, 229 Ill. 562, 82 N. E. 350; *Noble v. Noble*, 255 Ill. 629, 99 N. E. 631.

<sup>101</sup> *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177.

<sup>102</sup> See *Greene v. Maxwell*, 251 Ill. 335, 96 N. E. 227, 36 L. R. A. (N. S.) 418; *Bond v. Branning Mfg. Co.*, 140 N. C. 381, 52 S. E. 929; *Ennis v. Burnham*, 159 Mo. 494, 60 S. W. 1103; *Neel v. Powell*, 130

comparison is idle and unprofitable because purely abstract. The true test in every case, as above stated, is whether or not the person had enough reason and intelligence to understand the nature and consequences of the particular transaction before him, and to exercise a reasonable measure of judgment and choice in regard to it; and this test is to be applied whatever be the nature of the act, whether it be the making of a deed, a will, a gift, or any other contract or disposition of property. At the same time, it is unquestionably true that the degree or measure of mental power required may vary with the nature of the particular transaction, and may be higher or lower according as the business in hand is complicated or simple. It is said that where the transaction involved is a conveyance of real estate made by a father to his son, in consideration of the latter's agreement to maintain the former during his life, and is done with a view to securing a home and support for the father, and also as an advancement to the son, equalizing him in the father's estate with the other members of the family, it would be error to require as great a degree of mental capacity as would be demanded if the transaction were with a stranger or of an adversary character.<sup>103</sup> There is also a dictum to the effect that, where a person is competent to contract in law, a court of equity will not regard him as incompetent.<sup>104</sup> And a person's mind may be so far impaired as to afford grounds for setting aside an agreement made by him, though the incompetency is not sufficient to justify the appointment of a guardian or committee for his person and estate.<sup>105</sup>

§ 263. **Weakness of Intellect.**—Mere mental weakness, or feebleness or dullness of intellect, from whatever cause arising, if it does not amount to imbecility or render the party incapable of understanding the nature and effects of his act, does not incapacitate him from making a valid deed or contract. Proof of such feeble-mindedness does not overcome

Ga. 756, 61 S. E. 729; *Best v. House* (Ky.) 118 S. W. 849; *Martin v. Upson*, 187 Mo. App. 631, 173 S. W. 69.

<sup>103</sup> *Pepple v. Pepple*, 13 Ohio Cir. Ct. R. 43.

<sup>104</sup> *Devall v. Devall*, 4 Desaus. (S. C.) 79.

<sup>105</sup> *In re Morgan*, 7 Paige (N. Y.) 236.

the legal presumption of sanity; and a contract or deed made by such a person should not be declared void on that ground in the absence of evidence that an unfair advantage was taken of his condition, or that he was the victim of fraud, duress, or undue influence.<sup>106</sup> Thus, although it appears that the party in question was a man of unusually weak understanding, and capable of conducting only the most simple and most ordinary business, yet this alone is not sufficient ground for setting aside his contracts,<sup>107</sup> nor should they be vacated on a showing that his intelligence is of such a low order, or his faculties so far impaired, that he cannot transact business prudently and judiciously, or that he exhibits weakness and folly in his business dealings.<sup>108</sup> And mere habits of forgetfulness, whether in the young or the old, are not of themselves sufficient evidence

<sup>106</sup> *Oxford v. Hopson*, 73 Ark. 170, 83 S. W. 942; *Green v. Hulse*, 57 Colo. 238, 142 Pac. 416; *Reeve v. Bonwill*, 5 Del. Ch. 1; *Clarke v. Hartt*, 56 Fla. 775, 47 South. 819; *Johnson v. Coleman*, 134 Ga. 696, 68 S. E. 480; *Hartley v. Marietta Nursery Co.*, 138 Ga. 736, 76 S. E. 39; *Kirk v. Kirk*, 123 Ga. 104, 50 S. E. 928; *Nance v. Stockburger*, 111 Ga. 821, 36 S. E. 100; *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Saffer v. Mast*, 223 Ill. 108, 79 N. E. 32; *Beaty v. Hood*, 229 Ill. 562, 82 N. E. 350; *Pickerell v. Morss*, 97 Ill. 220; *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. 589; *Miller v. Craig*, 36 Ill. 109; *Baldwin v. Dunton*, 40 Ill. 188; *Rogers v. Higgins*, 57 Ill. 244; *Graham v. Castor*, 55 Ind. 559; *Somers v. Pumphrey*, 24 Ind. 231; *Henry v. Ritenour*, 31 Ind. 136; *Paulus v. Reed*, 121 Iowa, 224, 96 N. W. 757; *Bevins v. Lowe*, 159 Ky. 439, 167 S. W. 422; *Hovey v. Hobson*, 55 Me. 256; *Richardson v. Travelers' Ins. Co.*, 109 Me. 117, 82 Atl. 1005; *Cain v. Warford*, 33 Md. 23; *Davis v. Phillips*, 85 Mich. 198, 48 N. W. 513; *Akers v. Mead* (Mich.) 154 N. W. 9; *Wherry v. Latimer*, 103 Miss. 524, 60 South. 563, 642; *Mulloy v. Ingalls*, 4 Neb. 115; *Dewey v. Allgire*, 87 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *West v. West*, 84 Neb. 169, 120 N. W. 925; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Rippy v. Gant*, 39 N. C. 443; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Lamb v. Perry*, 169 N. C. 436, 86 S. E. 179; *Kime v. Addlesperger*, 24 Ohio Cir. Ct. R. 397; *Loman v. Paulin* (Okl.) 152 Pac. 73; *Alman v. Stout*, 42 Pa. 114; *Moorhead v. Scovel*, 210 Pa., 446, 60 Atl. 18; *Woodville v. Woodville*, 63 W. Va. 286, 60 S. E. 140; *Henderson v. McGregor*, 30 Wis. 78.

<sup>107</sup> *Harris v. Wamsley*, 41 Iowa, 671.

<sup>108</sup> *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Siemon v. Wilson*, 3 Edw. Ch. (N. Y.) 86; *Smith v. Beatty*, 37 N. C. 456, 40 Am. Dec. 435.



of a want of mental capacity.<sup>109</sup> And again, a marked difference in the mental capacity of the two contracting parties cannot be taken into account on this issue. That one of them was shrewd, clever, and unscrupulous, and the other weak and credulous, may have an important bearing on the question of rescinding a contract on the ground of fraud, false representations, or gross inadequacy of consideration.<sup>110</sup> But if it is shown that the person seeking relief, though feeble-minded, yet had mental capacity to contract, and no fraud or undue influence appears, equity will not interfere on the ground merely that the other party was greatly his superior in respect to intelligence and sagacity.<sup>111</sup> The true test always is the person's capacity to understand and assent to the particular transaction in question. However much his mental faculties may be impaired, or however low his natural endowment of intelligence, if he possesses the mental capacity to understand in a reasonable manner the nature and consequences of the transaction before him, and to exercise a reasonable measure of judgment and choice in regard to it, he is sane, *quoad hoc*, and must be held bound by what he has done.<sup>112</sup> On the other hand, it is equally true that a grantor in a deed, for instance, though he is not positively insane nor utterly imbecile, may yet be so far incapacitated as to be unable to bring an intelligent judgment and understanding to bear on any business matter, and so be incompetent to execute a valid deed.<sup>113</sup> This principle is illustrated by a case in which an aged, infirm, and feeble-minded woman executed a deed conveying all her property to her son, after it had been read over to her and after a lawyer had carefully explained to her the difference between a deed and a will, but it was

<sup>109</sup> *Bowdoin College v. Merritt* (C. O.) 75 Fed. 480.

<sup>110</sup> *Supra*, §§ 113, 125, 170.

<sup>111</sup> *Thomas v. Sheppard*, 2 McCord Eq. (S. C.) 36, 16 Am. Dec. 632; *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051.

<sup>112</sup> *Davis v. Phillips*, 85 Mich. 198, 48 N. W. 513; *Merchants' Nat. Bank v. Soesbe*, 138 Iowa, 354, 116 N. W. 123; *Du Bose v. Kell*, 90 S. C. 196, 71 S. E. 371; *Stanfill v. Johnson*, 159 Ala. 546, 49 South. 223; *Altig v. Altig*, 137 Iowa, 420, 114 N. W. 1056.

<sup>113</sup> *Jones v. Travers* (Ark.) 172 S. W. 828; *Volz v. Scully*, 159 Ky. 226, 166 S. W. 1015; *Pritchard v. Hutton* (Mich.) 153 N. W. 705; *Buchanan v. Wilson*, 97 Neb. 360, 149 N. W. 802.

shown that she had not at all understood the transaction, on account of her mental weakness, and rested in the belief that the instrument which she had signed was her will. On these facts, aided by a showing of failure of consideration, it was ordered that the deed should be canceled.<sup>114</sup>

**§ 264. Mental Weakness Accompanied by Fraud or Undue Influence.**—In cases where one of the parties to a deed or contract is shown to be feeble-minded or mentally weak, but not to such a degree as to amount to entire incapacity to contract, yet if it appears that the transaction in question was characterized by any unconscientious features, a court of equity will interfere and grant appropriate relief.<sup>115</sup> If it is shown that the other party took advantage of such mental weakness, and induced the feebler person to execute a deed or enter into a contract to which he would not have assented in the free exercise of his deliberate judgment, accomplishing his purpose by misrepresentations, concealment, fraud, duress, threats, depriving the person of the benefit of independent advice, or by the undue exercise of any influence which he may possess over him, or by any other improper practice, then the contract or conveyance may be set aside, not alone on the ground of mental incapacity, but on the ground of fraud and imposition.<sup>116</sup> In other words, if there be any unfairness in the transaction, then the intellectual deficiency of the party may be taken into the estimate as a circumstance showing fraud such as to justify annulling the contract or deed.<sup>117</sup> It is said that

<sup>114</sup> *Wille v. Wille*, 57 S. C. 413, 35 S. E. 804.

<sup>115</sup> *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827.

<sup>116</sup> *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429; *Kilgore v. Cross* (C. C.) 1 Fed. 578; *Yount v. Yount*, 144 Ind. 133, 43 N. E. 136; *Wray v. Wray*, 32 Ind. 126; *Harris v. Wamsley*, 41 Iowa, 671; *Landis v. Smith*, 113 Mich. 407, 71 N. W. 937; *Bennett v. Bennett*, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994; *Roberts v. Barker*, 63 N. H. 332; *Garrow v. Brown*, 60 N. C. 595, 86 Am. Dec. 450; *Rippy v. Gant*, 39 N. C. 443; *Tracey v. Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610; *Krings v. Krings*, 43 Pa. Super. Ct. 590; *Sparks v. White*, 7 Humph. (Tenn.) 86; *Tally v. Smith*, 1 Cold. (Tenn.) 290.

<sup>117</sup> *In re Owings*, 1 Bland (Md.) 370, 17 Am. Dec. 311; *Beller v. Jones*, 22 Ark. 92; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Lamb v. Perry*, 169 N. C. 436, 86 S. E. 179; *Duroderigo v. Culwell* (Okl.) 152 Pac. 605.

persons who, on account of mental weakness, are incapable of caring properly for their own interests, are under the special protection of the law,<sup>118</sup> and will readily be accorded relief if they are overreached by those in whom they repose trust and confidence.<sup>119</sup> If the other contracting party knows that the one with whom he deals is weak-minded, and undertakes to give him advice, knowing that his statements will be relied on, he must exercise the utmost good faith, and the least proof of unfair dealing will warrant the setting aside of the resulting bargain.<sup>120</sup> Indeed, it is said that a transaction so conducted is presumptively fraudulent, and the burden of proof rests on the party claiming an advantage from it to show its entire fairness.<sup>121</sup> In a case in Illinois, the evidence showed that the grantor was an aged man, afflicted with hemiplegia,<sup>122</sup> unable to dress or feed himself or to walk, needing constant care, and in such a state of mind as rendered him fearful of the loss of such care, and that he was induced, upon the promise of future support, to convey a large part of his property to others, who, on account of his condition, had complete control over him, and it was held that the conveyance was invalid and should be set aside.<sup>123</sup>

**§ 265. Mental Weakness and Inadequacy of Consideration.**—Inadequacy of consideration is not by itself sufficient ground for rescinding a contract or ordering the cancellation of a deed,<sup>124</sup> and neither is mental weakness not amounting to entire incapacity to contract.<sup>125</sup> Yet when these two circumstances are combined, and it is shown that a transfer of property or other contract was obtained

<sup>118</sup> *Craddock v. Cabiness*, 1 Swan (Tenn.) 474.

<sup>119</sup> *Bunch v. Shannon*, 46 Miss. 525.

<sup>120</sup> *Faver v. Bowers* (Tex. Civ. App.) 33 S. W. 131.

<sup>121</sup> *Groff v. Stitzer*, 75 N. J. Eq. 452, 72 Atl. 970.

<sup>122</sup> In medical jurisprudence, this term means paralysis of one side of the body, commonly due to a lesion in the brain, but sometimes originating from the spinal cord. It is generally characteristic of this condition that the operations of the mind are much impaired or obscured. See *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003.

<sup>123</sup> *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015.

<sup>124</sup> *Supra*, § 169.

<sup>125</sup> *Supra*, § 263.

from a person of feeble mind and that no consideration, or a very inadequate consideration, was given in return, a very strong presumption of fraud arises, and unless it is successfully rebutted, a court of equity will set aside the deed or contract so obtained.<sup>126</sup> While a contract made by a person of fair understanding should not be set aside merely because it was a rash, improvident, or hard bargain, yet if made with a person of impaired mind or feeble intelligence, the inference is that it was obtained by imposition, deception, or undue influence, so as to cast upon the other party the burden of showing its fairness.<sup>127</sup> And it is said that a comparatively slight degree of mental incapacity will justify a court in setting aside a contract for which no valuable consideration has been received.<sup>128</sup> In these cases, also, it is not necessary that the inadequacy of the consideration should be such as to "shock the conscience." A court of equity will see to it that a bargain made with a person of weak mind shall be fair. The value of property is always a matter of estimate and opinion. But if disinterested third persons testify that in their judgment the consideration given is not adequate, it will satisfy the conscience of the court in refusing to sustain the transaction.<sup>129</sup> Nor is it necessary to show that the mentally incapable person was actually misled by fraud or imposed upon by undue influence.<sup>130</sup> Where there is imbecility or weakness of mind,

<sup>126</sup> *Whipple v. McClure*, 2 Root (Conn.) 216; *Maddox v. Simmons*, 31 Ga. 512; *McCormick v. Mallin*, 5 Blackf. (Ind.) 509; *Perkins v. Scott*, 23 Iowa, 237; *Harris v. Wamsley*, 41 Iowa, 671; *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308; *Williams v. Longman* (Iowa) 78 N. W. 198; *Worthington v. Campbell* (Ky.) 1 S. W. 714; *Howard v. Howard*, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; *Cray v. Wilson*, 19 Ky. Law Rep. 1153, 43 S. W. 186; *Stevens v. Snowden*, 7 Ky. Law Rep. 744; *Buchanan v. Wilson*, 97 Neb. 369, 149 N. W. 802; *Scovill v. Barney*, 4 Or. 288; *Mays v. Prewett*, 98 Tenn. 474, 40 S. W. 483; *McFaddin v. Vincent*, 21 Tex. 47; *Holden v. Crawford*, 1 Aik. (Vt.) 390, 15 Am. Dec. 700; *Conant v. Jackson*, 16 Vt. 335; *Mann v. Betterly*, 21 Vt. 326; *Allen's Adm'rs v. Allen's Adm'rs*, 79 Vt. 173, 64 Atl. 1110; *Samuel v. Marshall*, 3 Leigh (Va.) 567. And see, *supra*, § 173.

<sup>127</sup> *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448.

<sup>128</sup> *Weeke v. Wortmann*, 84 Neb. 217, 120 N. W. 933.

<sup>129</sup> See *Johnson v. Johnson*, 10 Ind. 387.

<sup>130</sup> *Cadwallader v. West*, 48 Mo. 483.

any act which induces the making of a contract without adequate consideration is undue and improper and a ground for setting aside the contract in a court of equity.<sup>181</sup> But of course the court will more readily afford relief if, in addition to the elements of mental weakness and inadequacy of consideration, it is shown that there were false and fraudulent representations made in regard to the subject of the contract,<sup>182</sup> or the actual exercise of an undue influence and control.<sup>183</sup> These principles are illustrated by a case in Michigan, in which it appeared that a person alleged to be mentally incompetent, managed his property to advantage so long as he kept it loaned out on mortgages, but when he commenced farming on a large scale, he was constantly being overreached in contracts for all classes of work, paying many times its value, until he had exhausted his large personal estate, and began to give notes for such work. The defendant, who had known him from boyhood, and had advised him in his business, and knew of the extravagant and fraudulent character of these contracts, bought up many of the notes, and procured in place of them new notes secured by mortgages. It was held that the mortgages should be allowed to stand only for the amount of benefit conferred by the work for which the original notes were given.<sup>184</sup>

§ 266. **Monomania; Fixed Particular Delusions.**—In medical jurisprudence, monomania is a type of insanity characterized by a perversion or derangement of the reason or understanding with reference to a single subject or small class of subjects, with considerable mental excitement and insane delusions, while, as to all matters outside the range of the peculiar infirmity, the intellectual faculties remain unimpaired and function normally. Thus the mental incompetence of a monomaniac is partial in the sense that it is confined to a particular subject or class of subjects, and yet it is complete in the sense that, as to that subject or class of subjects, the mind is utterly deranged and incapable of

<sup>181</sup> *Corbit v. Corbit*, 4 Wkly. Law Bul. (Ohio) 1006.

<sup>182</sup> *Bainter v. Fulta*, 15 Kan. 823.

<sup>183</sup> *Cole v. Cook*, 6 N. J. Eq. 627.

<sup>184</sup> *Gates v. Cornett*, 72 Mich. 420, 40 N. W. 740.

normal action.<sup>185</sup> Paranoia is a typical form of monomania, but not the only manifestation of it. An insane delusion is a fixed belief in the mind of the patient of the existence of a fact which has no objective existence, but is purely the figment of his imagination, and which is so extravagant that no sane person would believe it under the circumstances of the case, the belief, nevertheless, being so unchangeable that the patient is incapable of being permanently disabused by argument or proof. The characteristic which distinguishes an insane delusion from other mistaken beliefs or opinions is that it is not a product of the reason but of the imagination, that is, not a mistake of fact induced by deception, fraud, insufficient evidence, or erroneous reasoning, but the spontaneous conception of a perverted imagination, having no basis whatever in reason or evidence.<sup>186</sup>

The rule of law in regard to deeds, contracts, and other business dealings of persons thus afflicted is that monomania with reference to subjects not connected with the transaction in question, and not causing, inducing, or influencing it, will not be sufficient to invalidate it.<sup>187</sup> An act sought to be invalidated by reason of the doer's insanity must be the direct offspring and result thereof, and the fact that one is subject to an insane delusion does not alone

<sup>185</sup> Black's Law Dictionary (2d edn.) title "Insanity," and numerous cases there cited. As to hypochondria and a morbid state of mind with reference to disease and the apprehension of death, see *Beville v. Jones*, 74 Tex. 148, 11 S. W. 1128.

<sup>186</sup> See *Lang v. Lang*, 157 Iowa, 300, 135 N. W. 604, and numerous other cases cited in Black's Law Dictionary (2d edn.) title "Insanity." The fact that one is a believer in "spiritualism" and makes many apparently unreasonable statements, is not evidence of insanity. *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760.

<sup>187</sup> *McNett v. Cooper* (C. C.) 13 Fed. 586; *Burgess v. Pollock*, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218; *Lewis v. Arbuckle*, 85 Iowa, 335, 52 N. W. 237, 16 L. R. A. 677; *Staples v. Wellington*, 58 Me. 453; *Hovey v. Hobson*, 55 Me. 256; *Emery v. Hoyt*, 46 Ill. 258; *Turner v. Rusk*, 53 Md. 65; *Meigs v. Dexter*, 172 Mass. 217, 52 N. E. 75; *State v. Grand Lodge*, 78 Mo. App. 546; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Lozear v. Shields*, 23 N. J. Eq. 509; *Jones v. Hughes*, 15 Abb. N. C. (N. Y.) 141; *Ekin v. McCracken*, 32 Leg. Int. (Pa.) 405; *Boyce's Adm'r v. Smith*, 9 Grat. (Va.) 704, 60 Am. Dec. 313.

render him incompetent to make a deed or contract, unless it appears that such delusion extended to the very subject out of which the contract or conveyance grew or was the moving cause of it.<sup>138</sup> It should be remembered that the test of mental competence is the ability to understand and intelligently assent to, not business matters in general, but the particular transaction in question, and hence a contract should not be set aside because of insane delusions in the mind of a contracting party, unless he was influenced thereby to such an extent that he had no reasonable understanding of the nature and effect of that contract.<sup>139</sup> And one claiming to avoid a contract by reason of a temporary hallucination resulting from disease, which existed prior to the making of the contract, must show its continued existence when the contract was made, and that it was of a character affecting his capacity to make the contract.<sup>140</sup>

But on the other hand, one who is controlled by an insane delusion upon a particular subject is, as to that subject, a person of unsound mind, although his reason as to other subjects may be unimpaired.<sup>141</sup> Here, then, we have the case of one who may be perfectly capable of understanding the nature and consequences of his acts, and may even exhibit considerable sagacity and shrewdness, and yet may be impelled by his particular delusion to do some act affecting his rights or property which otherwise he would not have planned or even considered. Acts so prompted should clearly be treated as the acts of a madman or lunatic. Thus, where the maker of a note was under the insane delusion (very common in cases of paranoia) that he was being persecuted, pursued, and threatened, and that if he did not give the note in question he would be killed or imprisoned, it was held that the note was void.<sup>142</sup> In another case, a person, acting under an insane delusion that a conspiracy existed between his wife and children to injure

<sup>138</sup> *Reese v. Shutte*, 133 Iowa, 681, 108 N. W. 525.

<sup>139</sup> *Mathews v. Nash*, 151 Iowa, 125, 130 N. W. 796.

<sup>140</sup> *Staples v. Wellington*, 58 Me. 453.

<sup>141</sup> *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Lemon v. Jenkins*, 48 Ga. 313; *Cook v. Parker*, 4 Phila. (Pa.) 265.

<sup>142</sup> *Ellars v. Mossbarger*, 9 Ill. App. 122.



him, because of which he desired to prevent them from inheriting his estate, gave to defendant a large part of his property, under an arrangement suggested by defendant's agent, whereby defendant was to pay interest on the value of the property during the life of the donor, and it was held that the gift was void and that the property could be recovered by an action.<sup>143</sup> And again, where a person holding policies of life insurance, though having the mental capacity to know the nature and effect of his contracts, labored under an insane delusion that his children were about to murder him in order to collect the insurance, and was induced by this delusion to surrender his policies in consideration of the payment of their surrender value, it was held that such surrender was voidable after his death at the instance of his personal representatives.<sup>144</sup> In this case it was said: "We see no reason why a diseased condition of the mind which impels a person to make a contract he otherwise would not make should not be held to operate as effectually to avoid the contract as would a diseased condition of the mind which prevents such person from understanding the nature and effect of such contract. If the purpose of the law is to protect persons so far deprived by disease of their normal mental faculties as to be unable to protect themselves, that purpose would fail of accomplishment if relief were refused to one who understood, in the ordinary sense of the word, the nature and effect of a contract, yet was impelled by an insane delusion to enter into it, when but for the delusion he would not do so."

**§ 267. Old Age and Senile Dementia.**—Old age and physical infirmity, separately or combined, do not constitute mental incompetency and are not inconsistent with legal sanity.<sup>145</sup> Want of mental capacity to make a valid contract or conveyance will not be presumed merely because of

<sup>143</sup> *Riggs v. American Tract Soc.*, 95 N. Y. 503. See *Sedgwick v. Jack*, 111 Iowa, 745, 82 N. W. 1027.

<sup>144</sup> *New York Life Ins. Co. v. Hagler* (Tex. Civ. App.) 169 S. W. 1064.

<sup>145</sup> *Taylor v. Moore*, 112 Ky. 330, 65 S. W. 612; *Whitlock v. Dixon*, 150 N. C. 616, 64 S. E. 504; *Lee v. Lee*, 258 Mo. 599, 167 S. W. 1030.

advanced age, though accompanied by disease or bodily infirmity or feebleness.<sup>146</sup> The law prescribes no age limit beyond which one is incapacitated from executing a binding contract or a legally effective deed,<sup>147</sup> and even the fact that a grantor is nearly a centenarian does not conclusively show him to be mentally incompetent.<sup>148</sup> As a general rule, therefore, neither old age, sickness, nor distress in mind or body will incapacitate a person who has possession of his mental faculties and is able to understand the transaction in which he is engaged from disposing of his property or binding himself by a contract.<sup>149</sup> But further than this, though the mind of a person may be to some extent impaired by age or disease, or both, still if he has the capacity to comprehend and act rationally in the transactions in which he is engaged,—if he can understand the nature of his business, and the effect of what he is doing, and can exercise his will with reference to it,—his acts will be valid, and his deeds and contracts should not be set aside unless it also appears that there was fraud, duress, or undue influence.<sup>150</sup> Mere impairment of memory by reason of advanced years does not of itself indicate a want of capacity to execute a deed, but it must appear that the grantor did

<sup>146</sup> *Chadd v. Moser*, 25 Utah, 369, 71 Pac. 870.

<sup>147</sup> *Howard v. Howard*, 112 Va. 566, 72 S. E. 133.

<sup>148</sup> *Broaddus v. James*, 13 Cal. App. 464, 110 Pac. 158.

<sup>149</sup> *Crow v. Childress* (Tex. Civ. App.) 169 S. W. 927; *Jennings v. Hennessy*, 26 Misc. Rep. 265, 55 N. Y. Supp. 833; *Doherty v. Noble*, 138 Mo. 25, 39 S. W. 458.

<sup>150</sup> *Rogers v. Cunningham* (Ark.) 178 S. W. 413; *Jones v. Bolling*, 101 Ark. 611, 141 S. W. 1168; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356; *Martin v. Harsh*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Stone v. Wilbern*, 83 Ill. 105; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *Kelly v. Nusbaum*, 244 Ill. 158, 91 N. E. 72; *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021, 56 Am. St. Rep. 215; *McLaughlin v. McLaughlin*, 241 Ill. 366, 89 N. E. 645; *Johnson v. Watson*, 169 Ill. App. 218; *Sargent v. Roberts*, 265 Ill. 210, 106 N. E. 805; *Slaughter v. McManigal*, 138 Iowa, 643, 116 N. W. 726; *Nichols v. King*, 24 Ky. Law Rep. 124, 68 S. W. 133, 1114; *Jones v. Evans*, 7 Dana (Ky.) 96; *Paine v. Aldrich*, 60 Hun, 578, 14 N. Y. Supp. 538; *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340; *Nace v. Boyer*, 30 Pa. 99; *Ellis v. Mathews*, 19 Tex. 390, 70 Am. Dec. 353; *Stringfellow v. Hanson*, 25 Utah, 480, 71 Pac. 1052; *Greer v. Greer*, 9 Grat. (Va.) 330; *Ford v. Jones*, 22 Wash. 111, 60 Pac. 48; *Jarrett v. Jarrett*, 11 W. Va. 584; *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383.

not have sufficient mind and memory to comprehend the nature and character of the transaction in which he was engaged.<sup>151</sup> Thus, for example, a deed executed by a woman eighty-seven years old, pursuant to a fixed intention, and in accordance with the wishes of her late husband, from whom she had received the property, to her niece, who had long cared for her, was held valid, where she was fully advised by attorneys, although the evidence showed some impairment of her mental faculties.<sup>152</sup> So, in a case in Illinois, it was held that a grantor was competent to make a deed, although it appeared that he was too old and infirm to attend actively to business, being confined to his house and grounds, and frequently sick in bed, and that he was often unable to attend to his own physical wants, and was childish and fretful.<sup>153</sup> And in another case, a grantor's conveyance of land to his sons, in accordance with a purpose which he had often previously expressed, and with which he afterwards expressed satisfaction, was held valid, though made shortly after he was stricken with paralysis, and while he was very feeble and infirm from old age, but intellectually unaffected.<sup>154</sup>

But while a court of chancery will not presume that extreme old age alone is sufficient to establish a want of mental capacity such as to disable one from conducting his business affairs, yet it will always scrutinize with vigilance the character of transactions resulting in voluntary donations or grants to those who are likely, from their surroundings, to have exercised an influence over the aged and infirm, and will require proof showing the utmost good faith on the part of the grantee.<sup>155</sup> And while, as above stated, the utmost vigor of mind and clearness of intellect are not to be expected in the aged, and their absence is not necessarily inconsistent with the possession of sufficient mental capaci-

<sup>151</sup> *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881; *Riordan v. Murray*, 249 Ill. 517, 94 N. E. 947.

<sup>152</sup> *Tate v. Holmes*, 76 Fed. 664, 22 C. C. A. 466.

<sup>153</sup> *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86.

<sup>154</sup> *McKissock v. Groom*, 148 Mo. 459, 50 S. W. 115.

<sup>155</sup> *Sullivan v. Hodgkin*, 11 Ky. Law Rep. 642, 12 S. W. 773; *Hayes v. Kerr*, 19 App. Div. 91, 45 N. Y. Supp. 1050; *Davis v. Chaney*, 5 Ky. Law Rep. 689.

ty to make a valid deed or contract, yet if it shall appear in any case that the person's mind and understanding were so far lost that he was practically imbecile and incapable of comprehending what he was doing, and what would be its effect upon his property or rights, then a court will not hesitate to set aside the contract or conveyance.<sup>156</sup>

Senile dementia is a form of insanity occurring only in the case of persons of advanced age, resulting from degeneration or disorder of the brain, which is characterized by slowness and weakness of the mental processes, forgetfulness, loss of coherence, inability to reason, and general physical degeneration, verging on or passing into imbecility, and indicating the breaking down of the mental powers in advance of bodily decay. When this condition is shown to exist, it is sufficient to invalidate a deed or other business transaction.<sup>157</sup> In an illustrative case, a grantor seventy-eight years of age, afflicted with senile cerebral atrophy, and of so weak mind and memory that he often did not know his own children, with whom he lived, and would often become lost around his own house and premises, was held incapable of making a valid deed.<sup>158</sup>

§ 268. **Unconsciousness, Stupor, or Coma.**—No valid contract can be made with a person who is unconscious at the time of its execution, in the sense that he is unaware of his condition and surroundings and incapable of recognizing faces and objects, though perhaps able to articulate or even to sign his name as a purely mechanical act,<sup>159</sup> though it may be that a written contract made with a person in this condition may be enforced against the other party, when merely in affirmance of a previous verbal agreement, performance of which on the part of the incapacitat-

<sup>156</sup> *West v. Whittle*, 84 Ark. 490, 106 S. W. 955; *Eagan v. Conway*, 115 Ga. 130, 41 S. E. 493; *Studabaker v. Faylor* (Ind. App.) 80 N. E. 861; *Thompson v. Thompson*, 19 Ky. Law Rep. 241, 39 S. W. 822.

<sup>157</sup> *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146; *Galt v. Provan*, 108 Iowa, 561, 79 N. W. 357.

<sup>158</sup> *Cole v. Cole*, 21 Neb. 84, 31 N. W. 493.

<sup>159</sup> *Edson v. Hammond*, 142 App. Div. 693, 127 N. Y. Supp. 359; *Nason v. Chicago, R. I. & P. Ry. Co.*, 149 Iowa, 608, 128 N. W. 854.

ed person has already taken place.<sup>160</sup> The same rule applies also when the unconsciousness takes the form of complete stupor or a comatose condition. In a case in Texas, a deed was ordered set aside where it appeared that persons at the bedside of the grantor put a pen in his hand, raised him up in bed, and held the hand and made a mark with it, purporting to be the mark of the grantor, but he was all the while entirely unconscious.<sup>161</sup> So, one who is reduced to such extreme debility by intoxication as to be unable to rise, or even to sit up in bed unless supported, or to hold a pen and make a mark unless the hand and pen are held and guided for him, cannot execute a valid conveyance of his property.<sup>162</sup> And it is said that where the recitals in the acknowledgment of a deed are contradicted by evidence that the grantor, at the time of its execution, was in a state of coma, and the attesting witnesses and notary public are dead, the validity of the deed is for the jury.<sup>163</sup> Again, a deed was held invalid on proof that the grantor was ninety years old, partly deaf, nearly blind, unable to cut up his food or dress himself without help, and afflicted with a cancer, producing constant and at times excruciating pain, and requiring the administration of narcotics in quantities sufficient to produce stupor.<sup>164</sup>

**§ 269. Obscuration of Faculties Immediately Preceding Death.**—A deed is void where the signature of the grantor was obtained while he was on his deathbed, past understanding in any matter of business, and in that condition which often precedes the moment of dissolution, when the senses are dimmed, the speech almost inarticulate, the mind delirious, vacant, or sinking into coma.<sup>165</sup> A typical case is one in which the following evidence was held to warrant a finding that the grantor had not mental capacity to ex-

<sup>160</sup> *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819.

<sup>161</sup> *Winkler v. Winkler* (Tex. Civ. App.) 26 S. W. 893. And see *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609, L. R. A. 1915B, 678.

<sup>162</sup> *Wilson v. Bigger*, 7 Watts & S. (Pa.) 111.

<sup>163</sup> *Touart v. Rickert*, 163 Ala. 362, 50 South. 896.

<sup>164</sup> *Lansing v. Russell*, 13 Barb. (N. Y.) 510.

<sup>165</sup> *Robertson v. Newman*, 2 Tenn. Ch. App. 181; *Lenhard v. Lenhard*, 59 Wis. 60, 17 N. W. 877; *Turner v. Utah Title Ins. & Trust Co.*, 10 Utah, 61, 37 Pac. 91.

ecute the deed in question: That he executed it about noon, two or three hours before his death; that on the morning of the day of his death his physician found him sinking rapidly, and expected his death during the day; that the deed was prepared at the request and by the direction of the grantee; that the grantor's assent to it, when read to him, was "by a nod only, but it was a weak one"; and that, when it was presented to him to sign, he made no effort himself to write his signature, but the scrivener placed the pen in his hand, and, taking the hand in his own, traced the signature.<sup>166</sup> A still more extreme case was one in which the defendant wrote a deed to the land in question without any previous agreement with the owner as to its terms, or the latter's consent to execute it, went to such owner's home, and while he was dying, unconscious, and unable to raise his hand, and with his name already subscribed to the instrument, raised him from his bed, took his helpless hand, touched it to a pen, and then with the pen made a cross mark and wrote the words "his mark." It was held that the instrument was in effect a forgery and of course void.<sup>167</sup> And in another case it was ruled that a deed may be avoided on proof that the grantor was a paralytic, that the deed was made ten days before his death, and when he was in such a condition that he could not speak nor be induced to write nor to use a metallic alphabet of large letters which had been prepared for his use.<sup>168</sup>

**§ 270. Effects of Violent Grief, Anxiety, or Excitement.** Mental disturbances arising from intense excitement or the obsession of the stronger passions, such as grief, fear, or anxiety, may very well produce such a condition that the person is incapable of exercising the faculties of reflection, judgment, and choice, and make him quite indifferent to the consequences of any legal act he may be called upon to perform. But such states are not regarded in law as equivalent to a deprivation of reason, nor as proof of mental incompetence to make a deed or a contract. Thus a con-

<sup>166</sup> *Hepler v. Hosack*, 197 Pa. 631, 47 Atl. 847.

<sup>167</sup> *Abee v. Bargas* (Tex. Civ. App.) 65 S. W. 489.

<sup>168</sup> *McElwain v. Russell* (Ky.) 12 S. W. 777.

tract will not be set aside on the ground of mental incapacity of one of the parties where the evidence merely shows that he was laboring under intense anxiety and depression of spirits, but that he understood the effects of what he was doing and could exercise his will with reference to it.<sup>169</sup> But a mental condition of this kind may render the person peculiarly susceptible to outside influences, or unusually timid, or dull in regard to understanding the details of a transaction, or blind to the necessity of safeguarding his interests. Hence, when a deed or contract is assailed, not so much on the ground of mental incompetence, as on the ground of fraud, deception, undue influence, duress, or inadequacy of consideration, the fact that the person in question was at the time in a state of great excitement, or profoundly depressed, or under the sway of intense emotion, may very well be taken into account, and may be a decisive feature of the case, especially when he was also aged and infirm, and so less capable of resolution and resistance.<sup>170</sup>

**§ 271. Eccentricity and Erratic Habits of Mind.**—Eccentricities of mind or conduct, oddities of behavior, abnormal sentiments or feelings, or unorthodox opinions or beliefs are not inconsistent with even a high degree of sagacity in business matters. And personal or individual peculiarities of mind and disposition, which markedly distinguish the subject from the ordinary, normal, or average types of men, but do not amount to actual mental unsoundness or insanity, do not constitute sufficient ground for vacating his deeds or contracts, if, notwithstanding such aberrations, it appears that he has the capacity to understand the nature and effect of the transaction in question and to protect his own interests.<sup>171</sup> Thus, it is not proof of mental incapacity merely to show that the person in ques-

<sup>169</sup> *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Mallow v. Walker*, 115 Iowa, 238, 88 N. W. 452, 91 Am. St. Rep. 158.

<sup>170</sup> *Thomas v. Crawford*, 118 Mich. 253, 76 N. W. 394.

<sup>171</sup> *Baker v. Baker*, 239 Ill. 82, 87 N. E. 868; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Ward v. Ward*, 86 Neb. 744, 126 N. W. 305; *Sibley v. Somers*, 62 N. J. Eq. 595, 50 Atl. 321; *Ekin v. McCracken*, 11 Phila. (Pa.) 535; *Delaplain v. Grubb*, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788; *Black v. Post*, 67 W. Va. 253, 67 S. E. 1072.



tion was eccentric and subject to occasional delusions or lapses of memory, not affecting the particular transaction,<sup>172</sup> or that his actions were at times strange and eccentric,<sup>173</sup> or that he was rash in his speculations, erratic in conduct, and irascible in temper,<sup>174</sup> or querulous and fretful,<sup>175</sup> or that his conduct and sentiments were contrary to good morals.<sup>176</sup> But if it is shown that the peculiarities of his mind are such as, at times, to pass over the border-land and into the region of absolute insanity, then a conveyance executed by him at such a time should be canceled.<sup>177</sup>

**§ 272. Impairment of Faculties Through Addiction to Drugs.**—Certain narcotics and hypnotics, such as opium and its derivatives, when administered in sufficient quantities, produce a condition of stupefaction in which the patient, while conscious and able to speak and write, is incapable of intelligent reasoning or of sound judgment. When a person is thus under the influence of a drug of this kind he is mentally incapacitated to contract, but as the incapacity is only temporary, the contract is merely voidable and may be ratified or disaffirmed when he is restored to a normal condition, but if he then elects to repudiate it, he must return the consideration received.<sup>178</sup> But a permanent weakening or degeneration of the mental faculties may result from the continued use of such drugs, whether they are legitimately administered in medical practice for the alleviation of pain, or voluntarily sought and taken by the patient until a habit or addiction is formed. In the latter event, medical jurisprudence recognizes the ensuing morbid

And see *Demerse v. Mitchell* (Mich.) 154 N. W. 22; *Ellis v. McNally* (Mo.) 177 S. W. 654.

<sup>172</sup> *Crosby v. Dorward*, 248 Ill. 471, 94 N. E. 78, 140 Am. St. Rep. 230.

<sup>173</sup> *White v. Mooney*, 73 W. Va. 304, 80 S. E. 844.

<sup>174</sup> *Falk v. Wittram*, 120 Cal. 479, 52 Pac. 707, 65 Am. St. Rep. 184.

<sup>175</sup> *Dunaway v. Dunaway*, 32 Ky. Law Rep. 29, 105 S. W. 137.

<sup>176</sup> *Lord v. Reed*, 254 Ill. 350, 98 N. E. 553, Ann. Cas. 1913C, 139.

<sup>177</sup> *Fisher v. Fisher*, 12 Neb. 416, 11 N. W. 864.

<sup>178</sup> *Birmingham Railway, Light & Power Co. v. Hinton*, 158 Ala. 470, 48 South. 546. And see *Lascelles v. Clark*, 204 Mass. 362, 90 N. E. 875; *Barrett v. Lewiston, B. & B. St. Ry. Co.*, 104 Me. 479, 72 Atl. 308.

condition of the mental and moral faculties under the distinctive name of "toxicomania." This diseased condition may advance so far that the patient becomes practically an imbecile. That is, though he may not be incurable, yet while the diseased condition persists he is continuously (not occasionally) incapable of transacting any business with intelligence, reason, and judgment. And a deed or contract made by him under such circumstances may be voidable for that reason.<sup>179</sup> Also, in view of the fact that such persons are not able to guard their own interests with a normal degree of care and vigilance, courts will scrutinize their contracts and conveyances with reference to the possibility that they may have been made the victims of fraud, deception, imposition, or undue influence, and if any of these elements are found to be present, appropriate relief will be granted.<sup>180</sup>

**§ 273. Physical Infirmities Not Affecting Mental Powers.**—Bodily infirmities, however severe, which do not affect the mental capacity to such an extent as to unfit the person from attending to ordinary business, or comprehending the ordinary relations of his affairs, furnish no ground for setting aside a contract or conveyance made by him.<sup>181</sup> Thus, the fact that a person is blind does not affect the validity of his contracts if it is not shown that fraud or deception was practised upon him.<sup>182</sup> And one may make a valid contract, though affected by a stroke of paralysis, if he evinces ordinary business intelligence and capacity.<sup>183</sup> So also, one who is deaf and dumb from birth is not for

<sup>179</sup> See *Harding v. Handy*, 11 Wheat. 103, 6 L. Ed. 429; *McCord v. Thompson*, 131 Ga. 126, 61 S. E. 1121; *Lansing v. Russell*, 13 Barb. (N. Y.) 510; *Swank v. Swank*, 37 Or. 439, 61 Pac. 846; *Mays v. Prewett*, 98 Tenn. 474, 40 S. W. 483.

<sup>180</sup> *Disch v. Timm*, 101 Wis. 179, 77 N. W. 196; *Oxford v. Hopson*, 73 Ark. 170, 83 S. W. 942; *Mays v. Prewett*, 98 Tenn. 474, 40 S. W. 483.

<sup>181</sup> *Bowdoin College v. Merritt (C. C.)* 75 Fed. 480; *Lee v. Lee*, 258 Mo. 509, 167 S. W. 1030; *Dalbey v. Hayes*, 267 Ill. 521, 108 N. E. 657. See *Springer's Appeal*, 111 Pa. 228, 2 Atl. 855, as to gross inadequacy of consideration in an agreement obtained from an aged and infirm widow.

<sup>182</sup> *Guerra v. Rocco*, 181 Ill. App. 528.

<sup>183</sup> *Peake v. Van Lewven*, 59 Iowa, 764, 13 N. W. 843.

that reason to be regarded in law as non compos mentis, but rather as having the legal capacity to make contracts and dispose of property, although, according to the rule of the common law, his competency was not presumed but must be shown by proof.<sup>184</sup> In some jurisdictions, however, this antiquated notion has yielded to the results of modern intelligence and observation, and there is no presumption whatever against the mental capacity of a deaf-mute.<sup>185</sup> Again, a deed cannot be set aside merely on proof that the grantor said that when she signed it "she was so sick that she did not care what she did."<sup>186</sup> But if the issue is as to the practice of fraud, duress, or undue influence, it is always competent to show that the party whose act is in question was, at the time, too ill to pay attention to what was done, or suffering distracting pain, or dazed or stupefied, or prostrated by shock or nervousness.<sup>187</sup>

**§ 274. Effect of Restoration to Reason.**—Though a person may have been absolutely incapacitated by insanity, for a greater or less period of time, yet if he afterwards regains his reason, he recovers also the legal power to make binding contracts. The question of restoration to sanity, when a state of insanity has once been judicially ascertained, is generally a question of fact to be determined upon evidence. But in some states, it is regulated by a statutory provision that "after his incapacity has been judicially determined, a person of unsound mind can make no convey-

<sup>184</sup> *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Barnett v. Barnett*, 54 N. C. 221; *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187; *Collins v. Trotter*, 81 Mo. 275; *Quinn v. Halbert*, 55 Vt. 224; *Green's Adm'r v. Mason*, 84 Vt. 289, 79 Atl. 48; *Alexier v. Matzke*, 151 Mich. 36, 115 N. W. 251, 123 Am. St. Rep. 255, 14 Ann. Cas. 52.

<sup>185</sup> *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Christmas v. Mitchell*, 38 N. C. 535; *Hebert's Succession*, 33 La. Ann. 1099.

<sup>186</sup> *Barnes v. Gill*, 21 Ill. App. 129.

<sup>187</sup> *Union Pac. Ry. Co. v. Harris*, 63 Fed. 800, 12 C. C. A. 598 (affirmed, 158 U. S. 326, 15 Sup. Ct. 843, 39 L. Ed. 1003); *Chesapeake & O. R. Co. v. Howard*, 14 App. D. C. 262; *Bliss v. New York Cent. & H. R. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; *Erickson v. Northwest Paper Co.*, 95 Minn. 356, 104 N. W. 291; *Ballard v. Chicago, R. I. & P. R. Co.*, 70 Mo. App. 108; *Mensforth v. Chicago Brass Co.*, 142 Wis. 546, 126 N. W. 41, 512, 135 Am. St. Rep. 1084; *St. Louis & S. F. Ry. Co. v. Nichols*, 39 Okl. 522, 136 Pac. 159.

ance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom cured and restored to reason, shall establish the presumption of the legal capacity of such person from the time of such discharge."<sup>188</sup> But it is said that there is no presumption that time gives any relief from mental unsoundness incident to or caused by advanced old age.<sup>189</sup> After being restored to reason, the person formerly insane may also disaffirm and set aside any contract entered into while he was deprived of his reason,<sup>190</sup> and if the transaction in question was a conveyance of his property by deed, the disaffirmance may be effected for the benefit of the grantee in a deed of the same property executed after the grantor's restoration to sanity.<sup>191</sup>

§ 275. **Same; Ratification of Contract.**—A person who was insane at the time he made a contract may ratify it on regaining his reason, and this may be done not only by an express agreement, but also by subsequent acts equivalent thereto, and in either case the ratification will be binding upon him and may be insisted on by the other party.<sup>192</sup> Thus, in a case where a person bought certain machinery while he was insane, it was shown that, after recovering his reason, he inspected it with the aid of an expert and an attorney, that he subsequently called on the seller to set up the machinery, and that he neglected, for at least twelve months, while retaining control of it, to say anything indicating to the seller an election to disaffirm. It was held

<sup>188</sup> Civ. Code Cal., § 40; Rev. Civ. Code Mont., § 3597; Rev. Civ. Code Idaho, § 2608.

<sup>189</sup> *Raymond v. Wathen*, 142 Ind. 367, 41 N. E. 815.

<sup>190</sup> *Merry v. Bergfeld*, 264 Ill. 84, 105 N. E. 758.

<sup>191</sup> *Clay v. Hammond*, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146.

<sup>192</sup> *Whitcomb v. Hardy*, 73 Minn. 285, 76 N. W. 29; *George v. St. Louis, I. M. & S. Ry. Co.*, 34 Ark. 613; *Musselman v. Cravens*, 47 Ind. 1; *King v. Siple*, 166 Mich. 258, 131 N. W. 572, 34 L. R. A. (N. S.) 1058, Ann. Cas. 1912D, 702; *Lawrence v. Morris*, 167 App. Div. 186, 152 N. Y. Supp. 777.

as a matter of law that he had elected to affirm the contract, and that his remedy for any wrong which he might have suffered in the transaction was by an action for damages.<sup>193</sup> So also, when an agent makes a contract during the insanity of his principal, and the latter, on being restored to reason and having knowledge of the transaction, fails to repudiate the acts of the agent, he will be deemed to have assented to such acts.<sup>194</sup> And one who, after being restored to sanity, accepts the proceeds of a rescission of a conveyance agreed to by his committee, is estopped to repudiate the transaction.<sup>195</sup>

**§ 276. Restitution or Restoration of Consideration.—**One who makes a contract with an insane person, having knowledge of the fact of such insanity, and who takes advantage of it to practise fraud, imposition, or overreaching, will not be entitled to a restoration to his former position, or to a return of the money or property which he may have given in pursuance of the contract, upon its being rescinded or canceled by reason of such incapacity.<sup>196</sup> And where a lunatic is thus induced to give a deed or a mortgage to one who is aware of his insanity, and has lost, spent, or wasted the money which was given to him as consideration, equity will cancel the conveyance without requiring a return of the money to the lender, since the inability of the grantor or mortgagor to pay back the money is the natural result of the lender's act in advancing money to one who is, to his knowledge, incapable and irresponsible.<sup>197</sup> But where the lender of the money had no notice or knowledge of the in-

<sup>193</sup> *Newman v. Taylor* (Tex. Civ. App.) 122 S. W. 425.

<sup>194</sup> *San Francisco Credit Clearing House v. MacDonald*, 18 Cal. App. 212, 122 Pac. 964. But see *Brauer v. Lawrence*, 165 App. Div. 8, 150 N. Y. Supp. 497.

<sup>195</sup> *Newton v. Evers*, 77 Misc. Rep. 619, 137 N. Y. Supp. 507.

<sup>196</sup> *Elder v. Schumacher*, 18 Colo. 433, 33 Pac. 175; *Beckwith v. Cowles*, 85 Conn. 567, 83 Atl. 1113; *Eagan v. Conway*, 115 Ga. 130, 41 S. E. 493; *Jordan v. Kirkpatrick*, 251 Ill. 116, 95 N. E. 1079; *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245; *Studabaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397; *Wright v. Dufield*, 2 Baxt. (Tenn.) 218.

<sup>197</sup> *More v. More*, 133 Cal. 489, 65 Pac. 1044; *Fecht v. Freeman*, 251 Ill. 84, 95 N. E. 1043; *Amos v. American Trust & Sav. Bank*, 221 Ill. 100, 77 N. E. 462.

sanity, the incompetent not being under guardianship nor noticeably abnormal, and where no fraud is charged, the opinion has been advanced that the deed or mortgage should be canceled only on a return or tender of the consideration paid, and that the grantor cannot escape the duty of making such return on the ground that he has lost or squandered the property.<sup>198</sup> But this doctrine has been vigorously opposed, and the prevailing rule on this point appears to be that, irrespective of the question of knowledge, the deed or mortgage of a lunatic may be rescinded without restoring the consideration received, in the absence of proof that he still has in his possession the money paid to him, or any property acquired with it, or that it has been expended by him or for him for necessities.<sup>199</sup>

As a general rule, however, and apart from such exceptional cases, the prevailing modern doctrine in regard to contracts entered into by a person apparently sane, before

<sup>198</sup> *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214.

<sup>199</sup> *Williams v. Sapieha*, 94 Tex. 430, 61 S. W. 115; *Ricketts v. Joliff*, 62 Miss. 440; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414. In the case last cited it was said: "To say that an insane man, before he can avoid a voidable deed, must put the grantee in statu quo, would be to say, in effect, that, in a large majority of cases, his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater. One of the obvious grounds on which the deed of an insane man or an infant is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price and rendered the restoration of the consideration impossible. \* \* \* If the law required restitution of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in avoiding such contracts, the protection of those who cannot protect themselves, defeated. \* \* \* Doubtless if the grantor, having been restored to sound mind, or the infant upon coming of age, still retains and uses the consideration of the deed, without offer to restore, or seeks to enforce the securities, or avail himself of the contract which constituted such consideration, such conduct may furnish satisfactory, and, it may be, conclusive, evidence of a ratification. And this is the extent, we think, to which the cases have gone upon which the tenant especially relies."

the fact of insanity has been judicially established, is that such contracts are at most only voidable, and will not be set aside where the other party to be affected by the decree of the court had no notice of the fact of insanity, has practised no fraud, and derived no inequitable advantage, and the parties cannot be placed in statu quo by the mutual restoration of any property or other consideration received under the contract.<sup>200</sup> Thus, a lunatic who has purchased merchandise cannot escape liability for the price, where the contract of sale was fair and the seller was ignorant of the buyer's insanity, and the seller cannot be placed in statu quo.<sup>201</sup> Such was the decision in a case in Kentucky, where

<sup>200</sup> *Parker v. Marco* (C. C.) 76 Fed. 510; *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Snead v. Scott*, 182 Ala. 97, 62 South. 36; *Coburn v. Raymond*, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; *Eldredge v. Palmer*, 185 Ill. 618, 57 N. E. 770, 76 Am. St. Rep. 59; *Peck v. Barthelme*, 220 Ill. 199, 77 N. E. 216; *Scanlan v. Cobb*, 85 Ill. 296; *Merry v. Bergfeld*, 264 Ill. 84, 105 N. E. 758; *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Wilder v. Weakley*, 34 Ind. 181; *Copenrath v. Klenby*, 83 Ind. 18; *Fulwider v. Ingels*, 87 Ind. 414; *Physio-Medical College v. Wilkinson*, 108 Ind. 314, 9 N. E. 167; *Studabaker v. Faylor*, 170 Ind. 498, 83 N. E. 747, 127 Am. St. Rep. 397; *Behrens v. McKenzie*, 23 Iowa, 333, 92 Am. Dec. 428; *Corbit v. Smith*, 7 Iowa, 60, 71 Am. Dec. 431; *Ashcraft v. De Armond*, 44 Iowa, 229; *Smith's Committee v. Forsythe*, 28 Ky. Law Rep. 1034, 90 S. W. 1075; *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Gates v. Cornett*, 72 Mich. 420, 40 N. W. 740; *Morris v. Great Northern Ry. Co.*, 67 Minn. 74, 69 N. W. 628; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224; *Blount v. Spratt*, 113 Mo. 48, 20 S. W. 967; *Robinson v. Kind*, 25 Nev. 261, 59 Pac. 863, 62 Pac. 705; *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; *Miller v. Barber*, 73 N. J. Law, 38, 62 Atl. 276; *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Smith v. Ryan*, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; *Gilgallon v. Bishop*, 46 App. Div. 350, 61 N. Y. Supp. 467; *Loomis v. Spencer*, 2 Paige (N. Y.) 153; *Dodd v. Anderson*, 131 App. Div. 224, 115 N. Y. Supp. 688; *Carr v. Holliday*, 21 N. C. 347; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; *Parsons v. Lee*, 24 N. D. 639, 140 N. W. 712; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Lancaster County Nat. Bank v. Moore*, 78 Pa. 407, 21 Am. Rep. 24; *Sims v. McLure*, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196; *Williams v. Sapleha* (Tex. Civ. App.) 59 S. W. 947; *Molton v. Camroux*, 2 Exch. 487, 4 Exch. 17; *Price v. Bennington*, 7 De G., M. & G. 475; *Beavan v. McDonnell*, 9 Exch. 309; *Moss v. Tribe*, 3 Fost. & F. 297.

<sup>201</sup> *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418.



the wife of a lunatic joined with him in conveying her land in part payment for a steamboat purchased by him, knowing his insanity but concealing it from the other party, and acquiesced in the purchase until, owing to a seizure of the boat on a claim for repairs and his becoming insolvent, it was too late for the other party to be put in statu quo.<sup>202</sup> So, where a mortgage was given to secure the purchase price of personal property sold by defendants to the mortgagors, who were at the time apparently sane, or supposed by the defendants to be so, and the contract has become executed by the maturity of the debt, a foreclosure and sale, and the deeding of the premises to the purchaser, a bill to have the mortgage, foreclosure, and deed declared void should be dismissed for want of equity, as the court has no power to restore the defendants to their condition before they parted with their property.<sup>203</sup> But it seems that a rescission may be ordered if a substantial, though not entirely complete, restoration to the other party can be made, as was held in a case where the insane person had acquired real property in a trade, and, at the time of seeking rescission, a portion of the land had been washed away by the return of a river to an old channel which adjoined the land, and to which the river was at any time liable to return.<sup>204</sup> And although the situation may be such that the other party to the contract cannot be restored to his former situation by the act of the insane person or his guardian, yet rescission will not be refused if this can be accomplished by the act of the court.<sup>205</sup>

It is also a part of the rule that, when a rescission is effected, the insane person should be restored to his former condition in respect to the subject of the contract. One receiving personal property from another, and afterwards learning that the latter is insane, must take ordinary care of the property with a view to returning it on a rescission of the contract or on its repudiation when the insane person regains his reason.<sup>206</sup> And where one is compelled to give

<sup>202</sup> *Rusk v. Fenton*, 14 Bush (Ky.) 490, 29 Am. Rep. 413.

<sup>203</sup> *McNett v. Cooper* (C. C.) 13 Fed. 586.

<sup>204</sup> *Hale v. Kobbert*, 109 Iowa, 128, 80 N. W. 308.

<sup>205</sup> *Fulwider v. Ingels*, 87 Ind. 414.

<sup>206</sup> *Patton v. Washington*, 54 Or. 479, 103 Pac. 60.

up land which he has acquired by the deed of an insane grantor, he may be charged by the decree with a suitable rent for the premises,<sup>207</sup> against which he may set off the value of the improvements which he has made, if made in good faith, and provided they exceed in value the rent for his use of the land,<sup>208</sup> and it appears that he may also claim reimbursement for incumbrances which he has paid off, if it appears that the insane grantor or his estate was benefited by the clearing of the title.<sup>209</sup> So, where the consideration for a conveyance of lands by an insane grantor was an agreement for his support and maintenance by the grantee, and the bargain was not inequitable, and the agreement has been fairly performed, the grantee should not be required to reconvey the property to the grantor's executor, on a decree for rescission by reason of the grantor's insanity, except on condition that he shall be paid the fair value of the services rendered by him.<sup>210</sup> Finally, if the guardian of the insane person, or the latter himself on recovering his reason, elects to sue for damages in respect to a contract made while he was insane, instead of electing to rescind it, he is not required to tender back the consideration received.<sup>211</sup>

**§ 277. Intoxication as Ground of Rescission.**—It is adequate ground for the rescission of a contract or the cancellation of a conveyance that the party executing it was, at the time, in a state of alcoholic intoxication so far advanced as to deprive him of the intelligence necessary to an understanding of the nature and consequences of his acts.<sup>212</sup> In the law such a condition of drunkenness is regarded as a

<sup>207</sup> *Wampler v. Wolfinger*, 13 Md. 337.

<sup>208</sup> *Lillard v. Coffee* (Tenn. Ch. App.) 61 S. W. 1037; *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881.

<sup>209</sup> See *Williams v. Williams*, 265 Ill. 64, 106 N. E. 476; *Jefferson v. Rust*, 149 Iowa, 594, 128 N. W. 954.

<sup>210</sup> *Bollnow v. Roach*, 210 Ill. 364, 71 N. E. 454; *Gilgallon v. Bishop*, 46 App. Div. 350, 61 N. Y. Supp. 467.

<sup>211</sup> *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

<sup>212</sup> *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *McGinley v. Cleary*, 2 Alaska, 269; *Cecile v. St. Denis*, 14 La. 184; *Prentice v. Achorn*, 2 Paige (N. Y.) 30; *Morrison v. McLeod*, 22 N. C. 221.

temporary insanity or mental derangement,<sup>213</sup> and in civil proceedings (as distinguished from criminal cases) it is now regarded as entirely immaterial that the intoxication was the result of the party's own voluntary and intentional over-indulgence in liquor.<sup>214</sup> "It was once supposed to be the law that a deed obtained from a drunken man could not, for that cause, be avoided. But a more rational rule now prevails; and the law, now regarding the fact of intoxication, and not the cause or author of it, and regarding that fact as affording proof of a want of capacity to contract, which is one of the elements of every agreement, will interfere to relieve."<sup>215</sup> Nor do the authorities appear to make any distinction here (as is done in the case of insanity proper) in favor of those who deal with a drunken man supposing him to be sober. For it is a common-sense presumption that intoxication, carried to such a point as to make the subject incapable of understanding what he is doing, cannot fail to be obvious to any sober person who undertakes to transact business with him. Hence any dealing between persons so situated, which results in advantage to the man who is in full possession of his wits, is fraudulent per se. If, when a man is so drunk as to render him an easy prey to the designs of another, an unfair advantage is taken of his condition to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud.<sup>216</sup> And further, where one of the parties to a sale or conveyance was intoxicated at the time, inadequacy of price is direct evidence of fraud.<sup>217</sup> But because there must be fraud, imposition, or inadequacy of consideration in the transaction to enlist the aid of a court of equity, a transaction effected by a drunken man will not be set aside where it is beneficial to him or his family, or where it is such as he ought in good morals to abide by. Thus, if a person, while intoxicated,

<sup>213</sup> *Menkins v. Lightner*, 18 Ill. 282.

<sup>214</sup> *Straughan v. Cooper*, 41 Okl. 515, 139 Pac. 265.

<sup>215</sup> *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441.

<sup>216</sup> *Calloway v. Witherspoon*, 40 N. C. 128; *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67; *Burch v. Scott*, 168 N. C. 602, 84 S. E. 1035.

<sup>217</sup> *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519.

voluntarily executes a deed of trust for the benefit of his wife and children, equity will not set it aside on the ground that undue advantage was taken of his condition.<sup>218</sup> And for similar reasons, a person who, when sober, agrees to sign a contract cannot defend against it on the ground that he was drunk when he actually signed it.<sup>219</sup> And on sound principles of justice, "if the party made himself drunk for the purpose of entering into agreements and then avoiding them, the fraudulent intent antedating his drunkenness would render it incompetent for him to avail of the defense."<sup>220</sup>

These principles are applicable to all classes of contracts. Thus, for example, a promissory note or bill of exchange signed (or indorsed) by a person who was so intoxicated as to be unable to understand what he was doing is void as between the original parties,<sup>221</sup> and voidable in the hands of an indorsee who is not an innocent holder,<sup>222</sup> though it appears that the defense of intoxication cannot be made against a subsequent holder for value without notice of the intoxication of the maker of the note or indorser as the case may be.<sup>223</sup> So also, a release, compromise, or settlement, obtained by taking advantage of the party while he was incapacitated from acting freely and intelligently by reason of intoxication, may be avoided on that ground.<sup>224</sup> And a transfer of shares of stock in a corporation, procured from the owner while so intoxicated as to be incapable of transacting any business, by fraud, with knowledge of his condition, will be set aside in equity, especially if the considera-

<sup>218</sup> *Hutchinson v. Tindall*, 3 N. J. Eq. 357. And see *Keeler v. Baker*, 1 Helsk. (Tenn.) 639.

<sup>219</sup> *Page v. Krekey*, 63 Hun, 629, 17 N. Y. Supp. 764, judgment reversed 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731.

<sup>220</sup> 1 Daniel, Nego. Instr. (3d edn.) § 215.

<sup>221</sup> *Gore v. Gibson*, 13 Mees. & W. 623; *Green v. Gunsten*, 154 Wis. 69, 142 N. W. 261, 46 L. R. A. (N. S.) 212.

<sup>222</sup> *Benton v. Sikyta*, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057.

<sup>223</sup> *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246. But compare 1 Daniel, Nego. Instr. (3d edn.) § 214.

<sup>224</sup> *Phelan v. Gardner*, 43 Cal. 306; *Murray v. Carlin*, 67 Ill. 286; *Davis v. Thornley*, 204 Ill. 266, 68 N. E. 482; *Lang v. Ingalls Zinc Co.* (Tenn. Ch. App.) 49 S. W. 288.

tion given was inadequate.<sup>225</sup> And intoxication at the time of entering into the marriage contract, though it will not render the marriage void, so that it could not support an indictment for bigamy, will still render it voidable.<sup>226</sup>

A person who has made a contract while in such a state of intoxication as to be incapable of exercising his understanding may avoid it himself, or he may defend against a proceeding to enforce it, and a court of equity will refuse to enforce it.<sup>227</sup> And a bill will lie, at the suit of an heir, to set aside a conveyance made by his ancestor while in a condition of intoxication.<sup>228</sup> So an assignor of insurance policies may maintain an action to recover the policies or their value on the ground that he was incapacitated by drunkenness to assign them, without first having the assignments set aside in equity.<sup>229</sup> But it seems that a recognizance cannot be impeached collaterally for the want of capacity occasioned by the drunkenness of the person by whom it was acknowledged.<sup>230</sup>

§ 278. **Degree or Measure of Intoxication.**—Admitting that a condition of alcoholic intoxication is to be considered as a species of temporary insanity, in respect to its effect upon contracts and other business transactions, it is said that “the difficulty generally has been to settle what degree of intoxication is sufficient to show the want of a consenting understanding. And as to that, it is evident that no universal rule can be laid down, since it is the deprivation of mind which the law has regard to, which may be very different in different individuals under the same circumstances of intoxication.”<sup>231</sup> Nevertheless, making due allowance for individual peculiarities, it has been necessary for the courts to formulate general rules on this point. And first, it is not sufficient to show that the person in question

<sup>225</sup> *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486.

<sup>226</sup> *Barber v. People*, 203 Ill. 543, 68 N. E. 93.

<sup>227</sup> *Conant v. Jackson*, 16 Vt. 335.

<sup>228</sup> *Prentice v. Achorn*, 2 Paige (N. Y.) 30.

<sup>229</sup> *Bursinger v. Bank of Watertown*, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848.

<sup>230</sup> *Cooper v. Harter*, 1 Ind. 427.

<sup>231</sup> *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441.

was under excitement from the use of intoxicating liquor.<sup>232</sup> For intoxication is progressive, and in its early stages the subject is not deprived of his reason and understanding, though he may be voluble, expansive in his ideas, easily impressed or persuaded, and foolish. Several of the courts have gone so far as to hold that drunkenness is not a ground for setting aside a contract unless so excessive as utterly to deprive the person of his reason and understanding,<sup>233</sup> or, as it is expressed in some of the decisions, the intoxication must have been such as to "drown reason, memory, and judgment," and to impair the mental faculties to such an extent as to render the party non compos mentis for the time being.<sup>234</sup> But these statements announce a rule which is regarded as extreme. Generally it has been thought that it was not necessary to prove an entire loss of reason or to show that the person was entirely demented by drink.<sup>235</sup> The test approved by the great majority of the decisions is the same which is applied in other forms of mental derangement, namely, that the deed or contract will be voidable if the person, at the time of its execution, was so far under the influence of intoxicants as to be unable to understand the nature and consequences of his act and unable to bring to bear upon the business in hand any degree of intelligent choice and purpose.<sup>236</sup> But the fact that one is too much

<sup>232</sup> *J. I. Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; *Cavender v. Waddingham*, 5 Mo. App. 457.

<sup>233</sup> *Johnson v. Phifer*, 6 Neb. 401; *Commonwealth v. McAnany*, 3 Brewst. (Pa.) 292; *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652; *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; *Burns v. O'Rourke*, 28 N. Y. Super. Ct. 649; *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121.

<sup>234</sup> *Martin v. Harsh*, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; *Dahlmann v. Gaugente*, 238 Ill. 224, 87 N. E. 287; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

<sup>235</sup> *Harmon v. Johnston*, 1 MacArthur (D. C.) 139.

<sup>236</sup> *Cook v. Bagnell Timber Co.*, 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251; *Pickett v. Sutter*, 5 Cal. 412; *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760; *Bates v. Ball*, 72 Ill. 108; *Shackelton v. Sebree*, 86 Ill. 616; *Ryan v. Schutt*, 135 Ill. App. 554; *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Mansfield v. Watson*, 2 Iowa, 111; *Drefahl v. Security Sav. Bank*, 132 Iowa, 563, 107 N. W. 179; *Kuhlman v. Welben*, 129 Iowa, 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666; *Johns v. Fritchey*, 39 Md. 258; *Carpenter v. Rodgers*, 61 Mich.

intoxicated to "fully" realize what he is doing does not, in the absence of fraud, invalidate a contract made by him while in that condition,<sup>237</sup> nor is it sufficient to show that he was in such a state that he did not clearly understand the business before him.<sup>238</sup> Thus, a promissory note will not be held voidable where the maker was not so drunk as to be unaware of what he was doing, and was not deceived or misled as to the identity or purport of what he signed, though he may have been so far intoxicated that he could not give proper attention and consideration to the transaction.<sup>239</sup> Inability to act wisely or discreetly, or to effect a good bargain, when induced by voluntary intoxication, is not enough to invalidate a contract.<sup>240</sup> And where a person, though intoxicated, was able to sign a note, and the next morning to remember that he had done so and for what the note was given, a case of complete intoxication is not made out, such as would invalidate the note.<sup>241</sup> It should be added that when intoxication is set up as a defense to a contract, at law, the question whether the person was so drunk when he made the contract as to render him incompetent to contract is for the decision of the jury.<sup>242</sup>

384, 28 N. W. 156, 1 Am. St. Rep. 595; *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; *Newell v. Fisher*, 11 Smedes & M. (Miss.) 431, 49 Am. Dec. 66; *Cavender v. Waddingham*, 2 Mo. App. 551; *J. I. Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; *Waldron v. Angleman*, 71 N. J. Law, 166, 58 Atl. 568; *Hutchinson v. Brown*, 1 Clarke Ch. (N. Y.) 408; *Spoonheim v. Spoonheim*, 14 N. D. 380, 104 N. W. 845; *Power v. King*, 18 N. D. 600, 120 N. W. 543, 138 Am. St. Rep. 784, 21 Ann. Cas. 1108; *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Coody v. Coody*, 39 Okl. 719, 136 Pac. 754, L. R. A. 1915E, 465; *McClure v. Mausell*, 4 Brewst. (Pa.) 419; *Morris v. Nixon*, 7 Humph. (Tenn.) 579; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *Foot v. Tewskbury*, 2 Vt. 97; *Arnold v. Hickman*, 6 Munf. (Va.) 15; *Hunter v. Tolbard*, 47 W. Va. 258, 34 S. E. 737. And see *Carroll v. Polfus*, 98 Neb. 657, 154 N. W. 213; *Burch v. Scott*, 168 N. O. 602, 84 S. E. 1035.

<sup>237</sup> *Nance v. Kemper*, 35 Ind. App. 605, 73 N. E. 937.

<sup>238</sup> *Henry v. Ritenour*, 31 Ind. 136.

<sup>239</sup> *Wright v. Waller*, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

<sup>240</sup> *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. O. 365, 50 S. E. 695, 107 Am. St. Rep. 532.

<sup>241</sup> *Caulkins v. Fry*, 35 Conn. 170.

<sup>242</sup> *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N.



§ 279. **Intoxication Voluntary or Induced by Other Party.**—If a person is induced to enter into a contract with another, who, with that very object in view, plies him with liquor and gets him drunk, so as to render him unfit to consider any business propositions or to understand what he is doing, and so takes advantage of him while in that condition, it is a fraud which will justify the rescission of the contract or a decree setting it aside.<sup>243</sup> It is pertinently remarked in this connection that the law must not be so administered as to encourage dishonest people to cultivate the depraved habits and appetites of others for greater facility in overreaching them.<sup>244</sup> But it is also a rule that a contract entered into by a person who, at the time, is so destitute of reason as not to know and understand what he is doing is voidable, though his condition is the result of alcoholic intoxication, and though the intoxication was voluntary, and not procured or increased by any act or connivance of the other party.<sup>245</sup> Here relief will be given, not so much on the ground of fraud—though it is clearly a fraud to take advantage of a man who is obviously drunk—as on the ground of his want of capacity to give a legally binding assent to the contract. We may therefore say that a contract may be rescinded or avoided if it appears either that the intoxication was produced by the act or connivance of

C. 365, 50 S. E. 695, 107 Am. St. Rep. 532. And see *Snead v. Scott*, 182 Ala. 97, 62 South. 36.

<sup>243</sup> *Dahlmann v. Gaugente*, 238 Ill. 224, 87 N. E. 287; *Scanlon v. Connor*, 168 Mich. 133, 133 N. W. 931; *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442; *Willoughby v. Moulton*, 47 N. H. 205; *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549; *Wingart v. Fry*, *Wright (Ohio)* 105; *Romine v. Howard* (Tex. Civ. App.) 93 S. W. 690.

<sup>244</sup> *Storrs v. Scougale*, 48 Mich. 387, 12 N. W. 502.

<sup>245</sup> *Donelson's Adm'r v. Posey*, 13 Ala. 752; *Drummond v. Hopper*, 4 Har. (Del.) 327; *Cummings v. Henry*, 10 Ind. 109; *English v. Young*, 10 B. Mon. (Ky.) 141; *Hauber v. Leibold*, 76 Neb. 706, 107 N. W. 1042; *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Dec. 519; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Prentice v. Achorn*, 2 Paige (N. Y.) 30; *Cameron-Barkley Co. v. Thornton Light & Power Co.*, 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; *Lacy v. Garrard*, 2 Ohio, 7; *French's Heirs v. French*, 8 Ohio, 214, 31 Am. Dec. 441; *Bush v. Breinig*, 113 Pa. 310, 6 Atl. 86, 57 Am. Dec. 469; *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473, 57 Atl. 959; *Berkley v. Cannon*, 4 Rich. (S. C.) 136; *White v. Cox*, 3 Hayw. (Tenn.) 79; *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602.

the party against whom relief is sought, or that an unfair advantage was taken of the person's condition.<sup>246</sup> But there is this important difference between the two cases, that a less degree of intoxication will suffice to avoid the contract, when the drunkenness was caused by the opposite party and he has taken advantage of it, than would be required where it was wholly voluntary.<sup>247</sup> That is to say, although the person in question may not be reduced to a condition of mere imbecility, or so entirely deprived of his reason as to be legally incompetent, yet if he was made drunk by the procurement of the person who seeks to overreach him, it is fraudulent conduct for that person to take an unfair advantage of him while he is merely stupid or muddled or merely excited by the liquor he has taken.

§ 280. **Habitual Drunkenness.**—In order to avoid a contract or conveyance, it is not enough to show that the party seeking relief was an habitual drunkard. In addition it must appear either that his indulgences had resulted in such mental degeneration or impairment of the faculties of his mind as to render him permanently incapable of transacting any business with intelligence, or else that he was actually so drunk at the particular time as not to know what he was doing.<sup>248</sup> Habits of intoxication, not excluding sober intervals and not incapacitating the person from attending to the ordinary transactions of life, will not suffice to avoid an agreement, in the face of evidence showing that he was sober at the time and understood the nature of the transac-

<sup>246</sup> *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Rodman v. Zilley*, 1 N. J. Eq. 320; *White v. Cox*, 3 Hayw. (Tenn.) 79.

<sup>247</sup> *Mansfield v. Watson*, 2 Iowa, 111; *Slevertsen v. Paxton-Eckman Chemical Co.*, 160 Iowa, 662, 133 N. W. 744, 142 N. W. 424; *Dewitt v. Bowers* (Tex. Civ. App.) 138 S. W. 1147; *Miller v. Steringer*, 66 W. Va. 169, 66 S. E. 228, 25 L. R. A. (N. S.) 596.

<sup>248</sup> *Davis v. Parsons*, 165 Cal. 70, 130 Pac. 1055; *Lavette v. Sage*, 29 Conn. 577; *Moorman v. Board*, 11 Bush (Ky.) 135; *Somers v. Ferris*, 182 Mich. 392, 148 N. W. 782; *Williams v. Williams*, 133 Mich. 21, 94 N. W. 370; *Dixon v. Dixon*, 22 N. J. Eq. 91; *Van Wyck v. Brasher*, 81 N. Y. 260; *Wolf v. Harris*, 57 Or. 276, 106 Pac. 1016, 111 Pac. 54; *Rutherford v. Ruff*, 4 Desaus. (S. C.) 350; *Birdsong v. Birdsong*, 2 Head (Tenn.) 289; *Burnham v. Burnham*, 119 Wis. 509, 97 N. W. 176, 100 Am. St. Rep. 895.

tion.<sup>249</sup> Thus, where it appears that the grantor in a deed was a hard drinker, and that his habits of intoxication had affected his health and frequently rendered him unfit for business, but that he had periods of sobriety when he was competent for business, and the evidence fails to show that he was intoxicated at the time the conveyance was made, it is not sufficient to avoid the transaction.<sup>250</sup> In a case before the Supreme Court of the United States, it was said of the grantor in question that he "was often intoxicated, and when in that condition was incapacitated to transact business. But for many years prior to his death there were intervals, some of them quite long, during which he avoided excessive indulgence in strong drink. His capacity, when sober, to transact business is abundantly shown. The vital inquiry is as to his capacity, not when he was intoxicated, but when the deeds were executed. The evidence leaves no room to doubt that, at those particular dates, he fully comprehended the character of those instruments. If it satisfactorily appeared that, from habitual dissipation or other cause, he was in such enfeebled condition of mind or body, immediately before or immediately after their execution, as to render him incompetent to transact business, the presumption might arise that he was unable, at the time, to understand what he was doing, and thus the burden of proof as to his capacity, at those particular dates, to dispose of his property, would be imposed upon the grantee."<sup>251</sup>

But on the other hand, where it is shown that the party executing a mortgage was rendered imbecile by habitual drunkenness, and reduced to a condition verging on insanity, by the practices of the mortgagee, who had obtained complete control over him, and the mortgagee is not able to show that he had given any valid consideration for the mortgage, a foreclosure and sale of the premises will be perpetually enjoined.<sup>252</sup> And in other cases, especially

<sup>249</sup> *Girault v. Feucht*, 120 La. 1070, 46 South. 26; *Ritter's Appeal*, 59 Pa. 9; *Coombe's Ex'r v. Carthew*, 59 N. J. Eq. 638, 43 Atl. 1057; *Morris v. Nixon*, 7 Humph. (Tenn.) 579.

<sup>250</sup> *Ralston v. Turpin* (C. C.) 25 Fed. 7.

<sup>251</sup> *Ralston v. Turpin*, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747.

<sup>252</sup> *Van Horn v. Keenan*, 28 Ill. 445.

where the elements of fraud or undue influence are present, relief has been given to a contracting party whose faculties are shown to have been much impaired by habitual intemperance,<sup>253</sup> or who appears to be characterized by weakness of mind caused by habitual drunkenness,<sup>254</sup> or who was induced, by misrepresentations, to execute a deed while in a weakened condition after a protracted debauch.<sup>255</sup> And in a case in Kentucky it is said that a person of known intemperate habits and with a disposition to sell or trade anything he has to get more liquor when drinking need not be wholly under the influence of liquor to avoid a contract made under circumstances indicating that undue advantage was taken of him, but it is sufficient if his weakness and his necessities are taken advantage of, and a contract obtained from him which no man in his sound and sober senses would have made.<sup>256</sup>

§ 281. **Voidability of Contract; Ratification or Disaffirmance.**—Intoxication at the time of the making of a contract does not create such a legal incapacity as will render the contract wholly void, and although the party who was intoxicated may rescind the contract on that ground, after becoming sober, yet the contract is merely voidable at his election and may be either affirmed or disaffirmed.<sup>257</sup> It may become valid and legally binding by ratification if he gives his express assent to it after recovering from the intoxication.<sup>258</sup> And moreover, if he desires to rescind or repudiate it, he must act with reasonable promptness after regaining his senses and coming to a realization of what he

<sup>253</sup> *Freeman v. Dwiggins*, 55 N. C. 162.

<sup>254</sup> *Marshall v. Billingsly*, 7 Ind. 250.

<sup>255</sup> *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121. But compare *Jones v. Hughes* (Iowa) 110 N. W. 900.

<sup>256</sup> *Matthis v. O'Brien*, 137 Ky. 651, 126 S. W. 156.

<sup>257</sup> *Oakley v. Shelley*, 129 Ala. 467, 29 South. 385; *Snead v. Scott*, 182 Ala. 97, 62 South. 36; *Sellers v. Knight*, 185 Ala. 96, 64 South. 329; *Harlan v. Brown*, 4 Ind. App. 319, 30 N. E. 928; *Lacy v. Mann*, 59 Kan. 777, 53 Pac. 754; *Matz v. Martinson*, 127 Minn. 262, 149 N. W. 370, L. R. A. 1915B, 1121.

<sup>258</sup> *Matthews v. Baxter*, L. R. 8 Exch. 132; *Strickland v. Parlin & Orendorf Co.*, 118 Ga. 213, 44 S. E. 997; *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584; *Arnold v. Hickman*, 6 Munf. (Va.) 15.

has done,<sup>259</sup> and if he continues to act upon the contract for any considerable time after becoming sober, it will be considered as an exercise of his election in favor of affirming the contract instead of repudiating it,<sup>260</sup> and mere acquiescence for a long term of years in respect to a conveyance made while in a state of intoxication will preclude the granting of any relief on that ground, certainly as against a third person taking title to the property in good faith and making improvements.<sup>261</sup>

§ 282. **Restoration of Consideration.**—As a general rule, one seeking the rescission or cancellation of a contract or conveyance on the ground of his intoxication at the time it was made must restore or offer to restore whatever he has received by way of consideration under it,<sup>262</sup> and if the situation of affairs is such that it is impossible to restore both parties to their former situation, this may be ground in equity for refusing to grant any relief on account of incapacity produced by intoxication.<sup>263</sup> In a case where the grantee in a deed given without consideration was aware that the grantor was too much intoxicated at the time to have any intelligent understanding of what he was doing, but had not in any way induced or connived at the intoxication, and where his motive in taking the deed was not personal gain, but to save the property for the grantor's family, as otherwise it would probably have been squandered, it was held, upon setting aside the conveyance in equity, that taxes paid by the grantee should be ordered repaid to him with interest, and that the complainant should have no costs.<sup>264</sup> On the other hand, where the evidence

<sup>259</sup> *Kelly v. Louisville & N. R. Co.*, 154 Ala. 573, 45 South. 906; *J. I. Case Threshing Machine Co. v. Meyers*, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; *Fowler v. Meadow Brook Water Co.*, 208 Pa. 473, 57 Atl. 959.

<sup>260</sup> *Moore v. Reed*, 36 N. C. 419.

<sup>261</sup> *Wright v. Fisher*, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886.

<sup>262</sup> *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; *Kyle v. Powell*, 96 Mo. 526, 10 S. W. 166; *Kelly v. Louisville & N. R. Co.*, 154 Ala. 573, 45 South. 906.

<sup>263</sup> *Menkins v. Lightner*, 18 Ill. 282.

<sup>264</sup> *Warnock v. Campbell*, 25 N. J. Eq. 485.

showed that the grantor was an habitual drunkard, was drunk when he executed the deed, and was incapable of transacting business; that the grantee, a practising attorney, had managed the affairs of the grantor's mother for some years, and that he took advantage of the confidence reposed in him by the grantor to secure the property for very much less than its fair value, it was held that the deed should be set aside without requiring a return of the money paid to the grantor at the time it was executed.<sup>265</sup>

<sup>265</sup> *Hardy v. Dyas*, 203 Ill. 211, 67 N. E. 852.

## CHAPTER XII

## INFANCY

- § 283. Capacity of Infants to Contract.
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§ 283. Capacity of Infants to Contract.—The common-law inability of infants to bind themselves by contracts is not founded upon any supposed mental incapacity, but upon the theory that, from lack of experience and immaturity, they do not possess the prudence and good judgment necessary to guard and advance their own interests and protect themselves against fraud and imposition. This presumption is often inconsistent with the actual fact. But an arbitrary point of time must be chosen, and the rule is wholesome in its general operation. The law makes no distinction between contracts made by an infant of tender



years and those entered into by one who has almost attained his majority.<sup>1</sup> This rule, however, is subject to certain statutory exceptions, as in New York, where a minor of the age of fifteen years or upwards is permitted to make a binding contract for a policy of insurance on his own life for his own benefit,<sup>2</sup> and in some states where a female minor obtains the privileges of majority if she marries while under the age of twenty-one.<sup>3</sup> And generally the fact that a minor has neither parent nor guardian does not remove his disability nor clothe him with power to contract generally.<sup>4</sup> Emancipation, at common law, amounts to no more than freeing a minor from parental control over the value of his services or the earnings of his labor during the remainder of his minority.<sup>5</sup> But in Louisiana (and perhaps some other states) a distinction is made, in respect to the right to rescind contracts, between those minors who have been emancipated and those who have not.<sup>6</sup>

**§ 284. Validity of Infants' Contracts in General.**—As a general rule, except in the case of the purchase or supply of necessities, the contracts of an infant are voidable at his election, but not absolutely void.<sup>7</sup> In the early days of

<sup>1</sup> *Ex parte McFerren*, 184 Ala. 223, 63 South. 159, 47 L. R. A. (N. S.) 543, Ann. Cas. 1915B, 672.

<sup>2</sup> *Hamm v. Prudential Ins. Co.*, 137 App. Div. 504, 122 N. Y. Supp. 35.

<sup>3</sup> See *Burr v. Wilson*, 18 Tex. 367.

<sup>4</sup> *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57.

<sup>5</sup> *Varney v. Young*, 11 Vt. 258; *In re Dunavant* (D. C.) 96 Fed. 542.

<sup>6</sup> "A simple lesion gives occasion to rescission, in favor of a minor not emancipated against all sorts of engagements, and in favor of a minor emancipated against all engagements exceeding the bounds of his capacity," as prescribed in another part of the Code. Rev. Civ. Code La., art. 2222.

<sup>7</sup> *In re Huntenberg* (D. C.) 153 Fed. 768; *Grievance Committee v. Ennis*, 84 Conn. 594, 80 Atl. 767; *Gannon v. Manning*, 42 App. D. C. 206; *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S. E. 756; *Shroyer v. Pittenger*, 31 Ind. App. 158, 67 N. E. 475; *Daugherty v. Reveal*, 54 Ind. App. 71, 102 N. E. 381; *Henderson v. Clark*, 163 Ky. 192, 173 S. W. 367; *Cogley v. Cushman*, 16 Minn. 397 (Gd. 354); *Hudson's Guardian v. Hudson*, 160 Ky. 432, 169 S. W. 891; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Shepard v. Atchison, T. & S. F. R. Co.*, 150 Mo. App. 98, 129 S. W. 1003; *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42

the common law, a distinction was commonly made between such contracts as were beneficial to the infant and those which operated to his prejudice. Thus, it was said: "When the court can pronounce the contract to be for the benefit of the infant, as for necessities, it is good, when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant."<sup>8</sup> And in more recent times we find decisions occasionally or partially reverting to this original view, as where general expressions are used to the effect that contracts of infants can be enforced against them only to the extent that they are beneficial.<sup>9</sup> But "the current of more recent decisions repudiates the distinction between void and voidable contracts, on account of their beneficial or prejudicial nature, and holds them all to be voidable merely, and the more recent decisions of courts adhering to the distinction hold some contracts voidable only which were before held to be void."<sup>10</sup> And in another case it was observed by a learned judge: "I am inclined to think that no contract entered into by an infant is absolutely void, though all contracts by infants, except for necessities, are voidable. There are some dicta that contracts made by an infant to his prejudice are void, not voidable. But I doubt whether in law there be any difference as to validity between those which are beneficial

L. R. A. (N. S.) 1115; *Hewitt v. Warren*, 10 Hun (N. Y.) 560; *Cohen v. Valley Stream Realty Co.*, 90 Misc. Rep. 343, 152 N. Y. Supp. 1075; *Frank Spangler Co. v. Haupt*, 53 Pa. Super. Ct. 545; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043; *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50; *Hobbs v. Hinton Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 82 S. E. 267. And see *Sands v. Curfman* (Tex. Civ. App.) 177 S. W. 161. But compare *Mellville v. Wickham* (Tex. Civ. App.) 169 S. W. 1123.

<sup>8</sup> *Keane v. Boycott*, 2 H. Blackst. 511. And see *Gannon v. Manning*, 42 App. D. C. 206.

<sup>9</sup> *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092, Ann. Cas. 1916A, 959; *South Texas Nat. Bank v. Texas & L. Lumber Co.*, 30 Tex. Civ. App. 412, 70 S. W. 768. The sale of a liquor saloon to a minor is not beneficial to him, so as to preclude him from disaffirming the contract, since he is disqualified from obtaining the license required for engaging in the business. *Chabot v. Paulhus*, 32 R. I. 471, 79 Atl. 1103.

<sup>10</sup> *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496.

and those which are prejudicial to the infant; both are voidable, but neither is absolutely void. There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract.”<sup>11</sup>

Assuming these principles to be correct, it is next to be remarked that there is no difference between executed and executory contracts, so far as the right of disaffirmance by an infant is concerned.<sup>12</sup> And the reasonableness and prudence of an infant's contract is immaterial where it is not one which, as a matter of law, is binding upon him.<sup>13</sup> On familiar principles, if such a contract is voidable only, and not void, it is operative and binding until repudiated. Thus, when merchandise is sold and delivered unconditionally on credit, without any stipulation that the title shall remain in the vendor until payment, the fact that the purchaser is an infant does not prevent the property from vesting in him.<sup>14</sup> And an undertaking by an infant as surety for a stay of execution, since it is not void but only voidable, may be ratified by him after reaching his majority, and then becomes a valid and enforceable contract.<sup>15</sup> But on the other hand, an infant, having sold personal property, may, on attaining his majority, disaffirm the sale, get possession of the property, and sell it again.<sup>16</sup> So, an infant may avoid

<sup>11</sup> *Hyer v. Hyatt*, 3 Cranch C. C. 276, Fed. Cas. No. 6,977.

<sup>12</sup> *Falconer v. May, Stern & Co.*, 165 Ill. App. 598; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043; *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216.

<sup>13</sup> *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.

<sup>14</sup> *Lamkin & Foster v. Ledoux*, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104.

<sup>15</sup> *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496. But see *Wills v. Evans*, 18 Ky. Law Rep. 1067, 38 S. W. 1090.

<sup>16</sup> *Williams v. Norris*, 2 Litt. (Ky.) 157.

a usurious contract entered into by him.<sup>17</sup> But a minor cannot disaffirm any obligation, otherwise valid, entered into by him under the express authority or direction of a statute.<sup>18</sup>

**§ 285. Deeds, Mortgages, and Other Transfers of Real Estate.**—Deeds and other conveyances of real property made by infants are voidable in their election but not absolutely void.<sup>19</sup> So, where land was conveyed to a trustee to hold for the life of the beneficiary, but with a proviso that it might be sold if the beneficiary should at any time make a written request therefor, and the beneficiary did so request the sale of the property, but he was only ten years old at the time, and the land was sold, it was held that he could avoid the sale on attaining his majority.<sup>20</sup> It is so also in regard to a purchase of real estate by a minor. An infant's contract for the purchase of land, which has been executed by a conveyance, may be disaffirmed within a reasonable time after he comes of age.<sup>21</sup> On similar principles, a mortgage of real or personal property executed by an infant may be avoided by him, at least where it has not been given for necessities, when he reaches his majority.<sup>22</sup> In a case where a minor contracted for the erection of a house, and gave a deed of trust in the nature of a mortgage to secure the payment of the contract price, it was held that he was entitled to the cancellation of both

<sup>17</sup> *Millard v. Hewlett*, 19 Wend. (N. Y.) 301.

<sup>18</sup> Civ. Code Cal., § 37; Rev. Civ. Code Mont., § 3594; Rev. Civ. Code N. Dak., § 4017; Rev. Civ. Code S. Dak., § 19; Rev. Laws Okl. 1910, § 887; Rev. Civ. Code Idaho, § 2605. And see *Clemmer v. Price*, 59 Tex. Civ. App. 84, 125 S. W. 604.

<sup>19</sup> *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800; *Schaffer v. Lavretta*, 57 Ala. 14; *Tunison v. Chamblin*, 88 Ill. 378; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Dixon v. Merritt*, 21 Minn. 196; *Allen v. Poole*, 54 Miss. 323; *Ferguson v. Bell*, 17 Mo. 347; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Wiser v. Lockwood*, 42 Vt. 720; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. But see *Jefferson v. Gallagher* (Okl.) 150 Pac. 1071.

<sup>20</sup> *Hill v. Clark*, 4 Lea (Tenn.) 405.

<sup>21</sup> *Clemmer v. Price*, 59 Tex. Civ. App. 84, 125 S. W. 604.

<sup>22</sup> *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *State v. Plaisted*, 43 N. H. 413; *Palmer v. Miller*, 25 Barb. (N. Y.) 399; *Skinner v. Maxwell*, 66 N. C. 45; *Richardson v. Boright*, 9 Vt. 368; *Gruba v. Chapman* (S. D.) 153 N. W. 929.

the instruments, and to a return of so much of the contract price as he had already paid, less compensation to the contractor for expenses incurred in carrying out the contract.<sup>23</sup> So it is said that, "where an infant purchases a chattel, and at the same time, and in part performance of the contract of purchase, executes a mortgage on the purchased property to secure the payment of the purchase money, it is not within the privilege of infancy to avoid the security given without also avoiding the purchase. If in such case the infant would rescind a part, he must rescind the whole contract, and thereby restore to his vendor the title acquired by the purchase."<sup>24</sup> In a recent case, however, it has been said that "a minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider."<sup>25</sup> It is likewise held that an exchange of property between an adult and an infant is voidable at the instance of the infant,<sup>26</sup> and a lease of his property given by an infant is not absolutely void, even if it appears that a better rent might have been obtained, but it is only voidable like other contracts.<sup>27</sup> But where an agreement was executed between the purchaser of property of an estate at a mortgage foreclosure sale and the representative of the heirs, by which the heirs were permitted to repurchase without limitation as to time, upon paying the purchaser for his labor and attention, it was held that a subsequent modification, requiring the heirs to redeem within

<sup>23</sup> Thornton v. Holland, 87 Miss. 470, 40 South. 19.

<sup>24</sup> Curtiss v. McDougal, 26 Ohio St. 66.

<sup>25</sup> Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 28 L. R. A. 187, 45 Am. St. Rep. 473.

<sup>26</sup> Williams v. Brown, 34 Me. 594.

<sup>27</sup> Griffith v. Schwendeman, 27 Mo. 412; Madden v. White, 2 Term, 159; Zouch v. Parsons, 3 Burr. 1794; Allen v. Allen, 2 Dr. & W. 307; Slater v. Brady, 14 Ir. C. L. 61.

five years, would not bind any of the heirs who were infants.<sup>28</sup>

§ 286. **Contracts for Services.** —It is generally held that an infant cannot bind himself irrevocably by a contract to work and labor or to render personal services for another, but such an engagement is voidable at his election during his minority or after he reaches full age.<sup>29</sup> Thus for instance, when a minor engages to serve as a seaman, either for a specified voyage or for a period of time, he may disaffirm the contract at any time, although he signed regular shipping articles, and it is even held that the contract is legally terminated by his desertion of the ship before the end of the voyage.<sup>30</sup> From the general rule it also follows that an agreement to give a specified notice of intention to leave his employment, or forfeit a certain amount of wages due, is not binding on a minor.<sup>31</sup> And a court will not enforce the contract of an infant for personal services by injunction compelling performance of a negative covenant binding the infant not to render services for others during the period of the employment.<sup>32</sup> So a minor who contracts with his employer that the price of articles, not necessities, purchased by him from his father shall be deducted from his wages, may, on becoming of age, repudiate his contract.<sup>33</sup> But notwithstanding the general recognition of the foregoing rules as correct, some of the courts are disposed

<sup>28</sup> *McKibben v. Diltz*, 138 Ky. 684, 128 S. W. 1082, 137 Am. St. Rep. 408.

<sup>29</sup> *Kansas City, P. & G. R. Co. v. Moon*, 66 Ark. 409, 50 S. W. 996; *Ray v. Haines*, 52 Ill. 485; *Garner's Adm'rs v. Board*, 27 Ind. 323; *Dallas v. Hollingsworth*, 3 Ind. 537; *Ping Min. & Mill. Co. v. Grant*, 68 Kan. 732, 75 Pac. 1044; *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *Lowe v. Sinklear*, 27 Mo. 308; *Thompson v. Marshall*, 50 Mo. App. 145; *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309; *Francis v. Felmit*, 20 N. C. 637; *Abell v. Warren*, 4 Vt. 149. *Contra*, *Abbott v. Inskip*, 29 Ohio St. 59.

<sup>30</sup> *Belyea v. Cook* (D. C.) 162 Fed. 180; *The Hotspur*, 3 Sawy. 194, Fed. Cas. No. 6,720; *Vent v. Osgood*, 19 Pick. (Mass.) 572.

<sup>31</sup> *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3.

<sup>32</sup> *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309.

<sup>33</sup> *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

to maintain that an infant should be held bound by his contract for the rendition of personal services, if it appears to be fair and just, to include a reasonable and adequate compensation, to be free from any fraud, imposition, or unfair advantage taken of the infant, and especially if it is seen to be beneficial to him.<sup>84</sup> Thus, it is said in one case that if an infant, about fourteen years old, enters into an agreement to labor until he shall come of age, in consideration of his being furnished with board, clothing, and education, and he is not overreached, and the agreement is not so unreasonable as to raise any suspicion of fraud, and it is sanctioned by his guardian and is fully performed on both sides, he is so far bound by his contract that he cannot maintain a quantum meruit for his services merely by showing that, in the event which has happened, his services were worth more than the stipulated compensation.<sup>85</sup> But on the other hand, the courts will be very ready to release a minor from his engagements if they shall appear to be unfair or disadvantageous to him. In a case in New York, there was a contract binding an infant to render services as an actress for certain theatrical seasons, but which gave to the other party, the manager of the theater, the right to terminate the contract at the end of any season, and stipulated that the services of the infant might be dispensed with, at the other party's election, without pay, for any cause. It was held that this contract was not for the interest of the infant, and the court would not prevent her from repudiating it during her infancy, especially as it appeared that the other party had disposed of her services to another at a profit.<sup>86</sup>

But it seems that a contract by which a minor binds himself to labor in return for food, clothing, and lodging, without any express agreement for any other compensation, is a contract for necessities, and therefore binding on the infant.<sup>87</sup> The special contract of apprenticeship is not ter-

<sup>84</sup> *Robinson v. Van Vleet*, 91 Ark. 262, 121 S. W. 288; *Breed v. Judd*, 1 Gray (Mass.) 455; *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152; *Abbott v. Inskip*, 29 Ohio St. 59.

<sup>85</sup> *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654.

<sup>86</sup> *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309.

<sup>87</sup> *Starke v. Storm's Ex'r*, 115 Va. 651, 79 S. E. 1057; *Wilhelm v. Hardman*, 13 Md. 140.



minable by either party without adequate cause, nor, generally, without an order of court for its dissolution. This subject is regulated by local statutes, but it may be remarked that the law on this subject in New York is held not to apply to the case of an infant engaging to render services as an actor,<sup>38</sup> and that, although a written agreement to which an infant is a party may be insufficient as an indenture of apprenticeship for want of compliance with the requirements of the statute, yet, if he continues to serve under it after attaining his majority, his doing so may be held to show a ratification and affirmance of the contract.<sup>39</sup> It should also be observed that, in some of the states, the statutes are so framed as to permit infants who are engaged in a trade, profession, or business to make legally binding contracts with those who employ their services.<sup>40</sup>

§ 287. **Same; Recovery for Services on Avoidance of Contract.**—It was held in some of the earlier cases that a minor who elects to repudiate his contract to render personal services, and quits his employment, thereby releases himself from any obligation as to further performance, but acquires no right to recover for past services either under the contract or on a quantum meruit.<sup>41</sup> And this was thought to be specially applicable where the consideration for his services was rendered and enjoyed continuously, as in the case of an agreement to furnish him with support and education.<sup>42</sup> But the rule now generally prevails that, in the case supposed, the infant is entitled to recover the reasonable value of his services rendered up to the time of terminating the contract, and this, although he left the employment on his own initiative and without any fault on the part of his employer.<sup>43</sup> Thus, in a case in Indiana, a minor

<sup>38</sup> *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309.

<sup>39</sup> *McDonald v. Sargent*, 171 Mass. 492, 51 N. E. 17.

<sup>40</sup> See *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788.

<sup>41</sup> *Weeks v. Leighton*, 5 N. H. 343; *Aldrich v. Abrahams*, Hill & D. Supp. (N. Y.) 423; *Harney v. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84; *Abbott v. Inskip*, 29 Ohio St. 59.

<sup>42</sup> *Wilhelm v. Hardman*, 13 Md. 140.

<sup>43</sup> *Ray v. Haines*, 52 Ill. 485; *Wheatly v. Miscal*, 5 Ind. 142; *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229; *Moses v. Stevens*, 2

who was employed by a corporation purchased certain shares of its stock, receiving a certificate therefor and executing his note for the amount, under an agreement by which he was to receive a weekly credit of a certain sum on the note, which credit was to be deducted from his earnings. Before he attained his majority and before the note was wholly paid, he tendered the certificate back to the corporation and demanded the return of his note and that the sums credited thereon should be paid to him, and it was held that he was entitled to recover.<sup>44</sup>

But a minor who thus repudiates a contract of employment can recover no more than he is equitably entitled to in all the circumstances of the case,<sup>45</sup> and it may be shown that his services were of no value at all, or that, allowing for injuries resulting from his breaking off the contract, he is not justly entitled to any recovery.<sup>46</sup> For if the employer suffers any damage from the act of the employé in terminating the contract, he is entitled to deduct it from the wages claimed or set it off,<sup>47</sup> though it seems that this does not extend to a claim for damages merely arising from the fact that the contract was broken before the expiration of the stipulated time,<sup>48</sup> or that the employé failed to give a stipulated notice of his intention to quit.<sup>49</sup> But if the employer's part of the contract, by which he undertook to furnish the employé with certain benefits or advantages, such as schooling, was not performed, and if, moreover, he assented to the employé's leaving his service, he cannot claim

Pick. (Mass.) 332; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Dube v. Beaudry*, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. Rep. 228; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Thompson v. Marshall*, 50 Mo. App. 145; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Lufkin v. Mayall*, 25 N. H. 82; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Webb v. Harris*, 32 Okl. 491, 121 Pac. 1082, Ann. Cas. 1914A, 602; *Dearden v. Adams*, 19 R. I. 217, 36 Atl. 3; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206.

<sup>44</sup> *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

<sup>45</sup> *Hagerty v. Nashua Lock Co.*, 62 N. H. 576.

<sup>46</sup> *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

<sup>47</sup> *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Lowe v. Sinklear*, 27 Mo. 308; *The Hotspur*, 3 Sawy. 194, Fed. Cas. No. 6,720.

<sup>48</sup> *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375.

<sup>49</sup> *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286.

a deduction on account of any damage sustained by the breaking of the contract.<sup>50</sup> And in a recent case it is said that a minor who contracts with his employer that the price of articles (not necessities) purchased by him from the employer shall be deducted from his wages, may, on repudiation of his contract, recover his wages without the deduction, although he may have disposed of the articles to his benefit.<sup>51</sup> It is also to be noted that an infant is competent to assume, by express contract, the family relation towards persons who are not related to him by blood, and that this will prevent him from recovering money for services rendered in the family.<sup>52</sup>

**§ 288. Infants Engaging in Business.**—In some of the states, it is provided by statute that if an infant practises a trade or profession or engages in business with the permission of his parent or guardian, he shall be liable on his contracts, as an adult would be, when they are made in the pursuit of such profession or business.<sup>53</sup> In these statutes, the term “engaging in business” should be construed as signifying an employment or occupation to which the infant devotes his time and efforts for the purpose of a livelihood or of profit. Hence a single transaction for the sale of land by a minor does not constitute the carrying on of a business nor bring him within the terms of the statute.<sup>54</sup> And evidence that an infant is working for wages in the employment of a mining company does not show him to be engaged in practising a trade or pursuing a business.<sup>55</sup> So also, the fact that a minor was employed as a farm laborer at a stipulated price per year, and that, while so engaged, he bought certain lots, does not show that he was engaged in business so as to preclude him from rescinding the purchase.<sup>56</sup>

<sup>50</sup> *Meeker v. Hurd*, 31 Vt. 639.

<sup>51</sup> *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

<sup>52</sup> *Purvlance v. Shultz*, 16 Ind. App. 94, 44 N. E. 766; *Yarwood v. Trusts & Guarantee Co.*, 94 App. Div. 47, 87 N. Y. Supp. 947. Compare *Garner's Adm'r v. Board*, 27 Ind. 323.

<sup>53</sup> Civ. Code Ga. 1910, § 4235; Code Iowa, § 3190. And see *Jim-merson v. Lawrence*, 112 Ga. 340, 37 S. E. 371.

<sup>54</sup> *White v. Sikes*, 129 Ga. 508, 59 S. E. 228, 121 Am. St. Rep. 228.

<sup>55</sup> *Pearson v. White*, 13 Ga. App. 117, 78 S. E. 864.

<sup>56</sup> *Belckler v. Guenther*, 121 Iowa, 419, 96 N. W. 895.

Aside from such enabling statutes, the fact that a minor engages in and pursues a business career does not in any way alter his status or prevent him from pleading his infancy as a defense against liability on his contracts or as a cause of rescission. Articles purchased by an infant for the carrying on of a trading business, and services rendered him in connection therewith, are not "necessaries," however essential they may be to the maintenance of his credit and the continuance of his business, and he may disaffirm his contracts therefor, even though he derives his living from the business so conducted.<sup>57</sup>

**§ 289. Infants as Members of Partnerships.**—A contract by which an infant becomes a partner in a firm is voidable, but not absolutely void. He may act as a partner and bind the firm by his acts. While his minority continues, he incurs no personal responsibility which can be enforced against him over his plea of infancy, and his property does not become liable for the debts of the firm. The adult partner has no right to rescind or repudiate the partnership agreement, but the infant may do so, on attaining his majority, and therewith disclaim the debts of the firm.<sup>58</sup> This is, however, strictly his personal privilege. Where a partnership composed of an infant and an adult purchases property, paying part of the price in cash and giving notes for the balance, the adult partner cannot escape liability on the

<sup>57</sup> *Crew-Levick Co. v. Hull*, 125 Md. 6, 93 Atl. 208; *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Mason v. Wright*, 13 Metc. (Mass.) 308; *Latt v. Booth*, 3 Car. & K. 292. An infant who is the master of a vessel is not liable for provisions supplied to his vessel. *A. B. v. Fogerty*, 2 Dane's Abr. (Mass.) 25. Contract for purchase of the possession and good will of a moving picture theater by an infant is voidable by him on reaching his majority. *Gannon v. Manning*, 42 App. D. C. 206.

<sup>58</sup> *Kuipers v. Thome*, 182 Ill. App. 28; *Bush v. Linthicum*, 59 Md. 344; *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Osburn v. Farr*, 42 Mich. 134, 3 N. W. 299; *Folds v. Allardt*, 35 Minn. 488, 29 N. W. 201; *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943; *Avery v. Fisher*, 28 Hun (N. Y.) 508; *Sparman v. Keim*, 83 N. Y. 245; *Crew-Levick Co. v. Hull*, 125 Md. 6, 93 Atl. 208. Compare *M. M. Sanders & Son v. Schilling*, 123 La. 1009, 49 South. 689.

notes because of the infancy of his copartner, and neither he nor the infant can recover back the money paid simply because of the minority of such partner.<sup>59</sup> In cases such as this, the courts will be careful to secure to the infant all that his status entitles him to, which is simply immunity from personal liability, but at the same time they will, as far as possible, do justice to the equitable rights and claims of the other partners and of creditors. Thus, an infant cannot, as against his copartners, insist that in taking the partnership accounts he shall be credited with profits and not debited with losses, and as against the creditors of the firm he has no higher rights to the firm property than the adult partners.<sup>60</sup> So, where an infant partner agrees that goods belonging to the firm shall be redelivered to the sellers in satisfaction of a balance due on the price thereof, he cannot repudiate the agreement and recover the goods or their value without paying or tendering to the sellers the balance of the original purchase price.<sup>61</sup> And the fact that a partner was a minor at the time a contract with the firm was made cannot be asserted as a defense to an action of replevin based on such contract, where no personal liability is claimed.<sup>62</sup> And partnership property is not to be lost to the creditors simply because an attachment must be dissolved as to an infant partner and allowed to stand only as to the individual interest of the other partner, for the adult partner has a right to insist that the assets of the firm shall be applied to the payment of the firm debts, and the infant partner's right to rescind is subject to this equity.<sup>63</sup> On similar principles, an assignment for the benefit of creditors made by a firm in which an infant is a partner is at most voidable at the election of the infant when he reaches his majority,<sup>64</sup> and an adjudication in bankruptcy may be made against the adult partners and against the firm as such, though not individually against the infant

<sup>59</sup> *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983.

<sup>60</sup> *Elm City Lumber Co. v. Haupt*, 50 Pa. Super. Ct. 489.

<sup>61</sup> *Gordon v. Miller*, 111 Mo. App. 342, 85 S. W. 943.

<sup>62</sup> *Richards v. W. H. Hellen & Son*, 153 Iowa, 66, 133 N. W. 393.

<sup>63</sup> *Hill v. Bell*, 111 Mo. 35, 19 S. W. 959.

<sup>64</sup> *Yates v. Lyon*, 61 N. Y. 344.

partner. In such a case, the assets of the firm and the separate estates of the adult partners may be administered in the bankruptcy proceedings, and must be applied to the payment of the partnership debts in full, before the infant partner is entitled to receive any portion of the firm's assets.<sup>65</sup> Again, the fact that one of the partners in a firm is an infant will not prevent the court, in a proper case, from making a decree dissolving the firm, appointing a receiver to wind it up, and enjoining the infant partner from collecting or disposing of any of the assets. And the receiver may be directed to collect the debts due to the firm, sell its assets, and pay its debts, the infant partner having no right or equity in the firm's assets superior to the rights of its creditors. But in such a proceeding no decree can be made which imposes any personal liability upon the infant partner for the debts of the firm (he having pleaded his infancy), nor enforcing against him any of the terms and conditions of the partnership agreement, nor even, it would seem, requiring him to pay any of the costs of the proceedings.<sup>66</sup>

If an infant partner means to disaffirm the partnership agreement, it is his duty to give notice thereof promptly on arriving at his majority. If he fails to do this, and neither expressly affirms nor expressly repudiates the partnership, he will continue to be responsible, not only to his copartners, but also to persons whose claims against the firm he thus impliedly ratifies or who do business with the firm in the belief that he is still a partner.<sup>67</sup>

**§ 290. Loans and Advances.**—Where a person lends money to an infant for the purpose of enabling him to purchase certain things which are necessities for him, and the money is actually so applied, the lender stands in the place of the person who supplied the necessities, and may maintain an action for the recovery of his money.<sup>68</sup> So, also,

<sup>65</sup> *Jennings v. Stannus*, 191 Fed. 347, 112 O. O. A. 91; *In re Duguld* (D. C.) 100 Fed. 274; *In re Dunnigan* (D. C.) 95 Fed. 428; *Lovell v. Beauchamp* [1894] App. Cas. 607.

<sup>66</sup> *Bush v. Linthicum*, 59 Md. 344.

<sup>67</sup> *Goode v. Harrison*, 5 Barn. & Ald. 147.

<sup>68</sup> *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Price v. Sanders*, 60 Ind. 310; *Watson v. Cross*, 2 Duv. (Ky.) 147.

where one lends money to a minor to enable him to pay a debt incurred for necessities, and the debt is actually paid therewith, the lender will stand in equity in the place of the original creditor, and the minor will be liable to him.<sup>69</sup> But this is a rule which is applied with considerable strictness, and extensions of it are not favored. Thus, in one of the cases, it appeared that certain land had been conveyed to a minor subject to a mortgage, and the mortgage was foreclosed and the land sold to the mortgagee. After the sale was confirmed, the minor's mother applied to the complainant for a loan of the amount necessary to redeem, and represented to him that if he advanced the money he would be subrogated to the rights of the mortgagee, that the minor had no means, and that the loan was necessary to enable him to redeem the property. But it was held that the minor was not legally bound to redeem, that such redemption was not necessary, and hence that the complainant was not entitled to a decree imposing a lien on the land for the amount so loaned.<sup>70</sup>

§ 291. **Bills and Notes.**—The better modern opinion is that a promissory note given by an infant in settlement of an account for necessities is valid and enforceable to the extent of the value of the necessities furnished.<sup>71</sup> But aside from this exceptional case, a note or bill given by a minor, though it is not absolutely void, is voidable at his option.<sup>72</sup> Thus, where an infant purchased machinery from

<sup>69</sup> *Price v. Sanders*, 60 Ind. 310; *Equitable Trust Co. v. Moss*, 149 App. Div. 615, 134 N. Y. Supp. 533.

<sup>70</sup> *Burton v. Anthony*, 46 Or. 47, 79 Pac. 185, 68 L. R. A. 826, 114 Am. St. Rep. 847.

<sup>71</sup> *Morton v. Steward*, 5 Ill. App. 533; *Price v. Sanders*, 60 Ind. 310; *Earle v. Reed*, 10 Metc. (Mass.) 387; *Bradley v. Pratt*, 23 Vt. 378.

<sup>72</sup> *Fant v. Cathcart*, 8 Ala. 725; *Buzzell v. Bennett*, 2 Cal. 101; *Watson v. Ruderman*, 79 Conn. 687, 66 Atl. 515; *Strain v. Wright*, 7 Ga. 568; *Morton v. Steward*, 5 Ill. App. 533; *Henderson v. Fox*, 5 Ind. 489; *La Grange Collegiate Institute v. Anderson*, 63 Ind. 367, 30 Am. Rep. 224; *Boody v. McKenney*, 23 Me. 523; *Earle v. Reed*, 10 Metc. (Mass.) 389; *Minock v. Shortridge*, 21 Mich. 304; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Darlington v. Hamilton Bank*, 63 Misc. Rep. 289, 116 N. Y. Supp. 678; *Hesser v. Steiner*, 5 Watts & S. (Pa.) 476; *Heffington v. Jackson & Norton*, 43 Tex. Civ. App. 560, 96 S. W. 108; *Memphis Coffin Co. v. Patton* (Tex. Civ. App.)



the plaintiff, giving his note therefor, but while still a minor repudiated the contract, refusing to pay the note, and not exercising any control over the machinery, which was taken possession of by the plaintiff and sold, shortly after the defendant attained his majority, it was held that his infancy was a good defense to an action on the note.<sup>73</sup> So, an infant who purchases land, giving negotiable notes in payment, is not entitled to take in preference to a superior outstanding title, since he can protect himself by disaffirming his contract and the notes.<sup>74</sup> But since an infant's note is not absolutely void, it may be ratified and affirmed by the infant after becoming of age.<sup>75</sup> A different question arises where the negotiable promissory note of a minor has passed into the hands of a bona fide purchaser for value without notice of the fact of his infancy, while that disability still continues. The cases on this point are not numerous, but so far as they go, they sustain the right of the infant maker to repudiate and disaffirm his note even as against such a third person.<sup>76</sup>

For similar reasons, an infant's indorsement of a bill or note made payable to himself, while it is voidable so far as concerns the enforcement of any personal liability against him in the character of an indorser, is valid so far as to pass title to the paper and enable the indorsee to recover against the party primarily liable.<sup>77</sup> Thus, in an early case in Massachusetts, an infant received a promissory note in payment of his claim against the maker for labor performed for him; and, for a valuable consideration, indorsed the

106 S. W. 697. One who gave a note while he was a minor and made a trust deed to secure it may replevin a horse seized by defendant under the trust deed. *Parker v. Gillis* (Miss.) 66 South. 978.

<sup>73</sup> *Nichols & Shepard Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516.

<sup>74</sup> *Nellius v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 156 S. W. 259.

<sup>75</sup> *Darlington v. Hamilton Bank*, 63 Misc. Rep. 289, 116 N. Y. Supp. 678.

<sup>76</sup> *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa, 294, 103 N. W. 961; *Darlington v. Hamilton Bank*, 63 Misc. Rep. 289, 116 N. Y. Supp. 678.

<sup>77</sup> *Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Frazier v. Massey*, 14 Ind. 382; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503.

note to a third person, who knew the indorser to be under age. Afterwards the father of the minor received the amount from the maker of the note in discharge of the note, both the father and the maker knowing of the indorsement. It was held that the indorsee was entitled to recover the amount of the note against the maker.<sup>78</sup> Again, an infant may execute a promissory note by an agent, and an infant promisee may also authorize another to transfer a note by indorsement for him, and the transfer is valid until disaffirmed by the infant.<sup>79</sup>

**§ 292. Purchase of Corporate Stock.**—A contract whereby an infant either purchases outstanding stock in a corporation or subscribes for stock to be issued to him from the treasury is voidable at his option. He may either affirm it on reaching his majority, or he may repudiate and rescind it at any time, whether before or after coming of age. But if he means to disaffirm the contract, he must exercise his right to do so within a reasonably limited time after attaining his majority, for if he continues to hold the stock for a period of years without any act of disaffirmance, he will be held to have ratified the purchase or subscription, at least as to creditors of the corporation in its insolvency or winding up.<sup>80</sup> It is said, however, that one buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders so as to bind themselves to the liabilities attaching to that character.<sup>81</sup> And an action by an infant to recover money given to defendant to invest in stocks cannot be sustained where it is not alleged or proved that the money was not invested as directed, and that the plaintiff did not receive the benefit thereof.<sup>82</sup>

<sup>78</sup> *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101.

<sup>79</sup> *Hastings v. Dollarhide*, 24 Cal. 195.

<sup>80</sup> *Foster v. Chase* (C. C.) 75 Fed. 797; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Robinson v. Weeks*, 56 Me. 102; *Gage v. Menczer* (Tex. Civ. App.) 144 S. W. 717; *Lumsden's Case*, L. R. 4 Ch. App. 31; *Baker's Case*, L. R. 7 Ch. App. 115; *Wilson's Case*, L. R. 8 Eq. 240; *In re Nassau Phosphate Co.*, 2 Ch. Div. 610.

<sup>81</sup> *Foster v. Chase* (C. C.) 75 Fed. 797.

<sup>82</sup> *Pierce v. Lee*, 36 Misc. Rep. 870, 74 N. Y. Supp. 926.

§ 293. **Appointment of Agent or Attorney.**—Notwithstanding earlier cases to the effect that an infant could not give a power of attorney or appoint an agent, and that his act purporting to do so was entirely void, it is now apparently well settled that the act of an infant in granting authority to an agent or appointing an attorney in fact is at most voidable, like his other contracts, at least in cases where the intention is that the agent or attorney should perform some special and particular act having relation to the property of the infant, the management of his affairs, or the preservation of his estate.<sup>83</sup> But the appointment by an infant of a permanent general agent would be void, and not merely voidable, since it would totally destroy the protection of minority established by the policy of the law.<sup>84</sup> So, a warrant of attorney to confess judgment given by an infant is not merely voidable at his option, but is void.<sup>85</sup> And it appears that even a contract by which an infant retains another to represent him in an action brought against him is not binding on the infant.<sup>86</sup>

§ 294. **Contracts of Release, Compromise, or Settlement.**—An infant's release, compromise, or settlement of a claim in his favor, whether sounding in contract or in tort, is voidable at his option.<sup>87</sup> Thus, where a minor gives a written release of a claim for damages for personal injuries, on receiving a sum of money from the person or corporation liable, or on the payment of such money to his parent, it is not binding on him by reason of his infancy, but he may disaffirm it and sue for the damages, before or after reach-

<sup>83</sup> *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Whitney v. Dutch*, 14 Mass. 457, 461, 7 Am. Dec. 229. And see *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092, Ann. Cas. 1916A, 959.

<sup>84</sup> 1 Whart. Contr. § 39.

<sup>85</sup> *Knox v. Flack*, 22 Pa. 337; *Saunderson v. Marr*, 1 H. Blackst. 75; *Oliver v. Woodroffe*, 4 Mees. & W. 650.

<sup>86</sup> *Pope v. Lyttle*, 157 Ky. 659, 163 S. W. 1121.

<sup>87</sup> *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. 109; *Interstate Coal Co. v. Trivett*, 155 Ky. 825, 160 S. W. 728; *Pitcher v. Turin Plank Road Co.*, 10 Barb. (N. Y.) 436; *Britton v. South Penn Oil Co.*, 73 W. Va. 792, 81 S. E. 525.

ing his majority,<sup>88</sup> although, if it shall appear on the trial of an action so brought that the money paid in satisfaction of the claim was an adequate compensation, the infant can recover only nominal damages.<sup>89</sup> And the rule that, where a release of liability for a tort has been given, no action can be maintained for damages until the consideration has been repaid or tendered, does not apply to the case of an infant who sues before he attains his majority.<sup>90</sup> So also, it is held that the acceptance by a minor of a railroad pass, containing an exemption from liability for negligence, does not operate to relieve the company from liability for an injury to such minor resulting from the negligence of the company.<sup>91</sup> On the same principle, where a legatee or distributee under a will is a minor, he cannot bind himself irrevocably by an agreement of compromise or settlement with the personal representatives or the other heirs, at least where it is not clear that the settlement is advantageous to him.<sup>92</sup> But it is not open to the adult party or parties to such an agreement to disregard it or refuse to carry it into effect, if the infant does not repudiate it.<sup>93</sup> So again, a settlement between a female infant and the father of her illegitimate child, by which she releases a judgment against him for the maintenance of the child in consideration of his agreement to marry her, is not binding on her if he fails to perform, and she may disaffirm it and sue to have the satisfaction of the judgment vacated.<sup>94</sup> For like reasons it is held that the claim of a widow, who is an infant, under a policy of insurance on her

<sup>88</sup> *Interstate Coal Co. v. Love*, 153 Ky. 323, 155 S. W. 746; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Palmer v. Conant*, 58 Hun, 333, 11 N. Y. Supp. 917; *Hollinger v. York Railways Co.*, 225 Pa. 419, 74 Atl. 344, 17 Ann. Cas. 571; *Turney v. Mobile & O. R. Co.*, 127 Tenn. 673, 156 S. W. 1085.

<sup>89</sup> *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88.

<sup>90</sup> *Worthy v. Jonesville Oil Mill*, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688.

<sup>91</sup> *Pennsylvania Co. v. Purvis*, 128 Ill. App. 367.

<sup>92</sup> *Durfee v. Abbott*, 50 Mich. 479, 15 N. W. 559; *Tipton v. Tipton's Ex'rs*, 48 N. C. 552; *In re Cummings' Estate*, 120 Iowa, 421, 94 N. W. 1117.

<sup>93</sup> *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

<sup>94</sup> *Relsh v. Thompson*, 55 Ind. 34. But see *Gavin v. Burton*, 8 Ind. 69.

husband's life is not effectively released by her act in bringing a suit for damages for his death and prosecuting the same to an adverse judgment, while still an infant, without the intervention of a guardian or next friend duly admitted by the court, although the application for the policy expressly provided that the bringing of such a suit should operate as a bar or release of all claims under the policy.<sup>95</sup> But in a case in a federal court it was said that, while it is the duty of counsel acting as guardian ad litem to advise with his client in the matter of a compromise agreement, yet where such client, on the approach of his majority, separates himself from his counsel and enters into a compromise agreement with his adversary, having been duly admonished of the effect of his act but nevertheless persisting in entering into the agreement, he has no claim on a court of equity to interfere.<sup>96</sup> An agreement by an infant to submit a disputed or litigated claim to arbitration is at least voidable if not void.<sup>97</sup> But a release given by a minor to his guardian is absolutely void, because the guardian is a trustee and cannot be permitted to deal with his ward in any way by which he might gain an advantage over the latter.<sup>98</sup>

§ 295. **Policies of Life Insurance.**—An insurance company cannot repudiate its policy of life insurance on the ground of the infancy of the assured; this is the privilege of the infant, but not of the insurer.<sup>99</sup> A policy so written on the life of a minor is not absolutely void, but neither is it absolutely binding on the infant, but he may, at his election, disaffirm and avoid it.<sup>100</sup> "It is mani-

<sup>95</sup> *Di Meglio v. Baltimore & O. R. Co.*, 1 Boyce (Del.) 74, 74 Atl. 558.

<sup>96</sup> *Bunel v. O'Day* (C. C.) 125 Fed. 303.

<sup>97</sup> *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88.

<sup>98</sup> *Fridge v. State*, 3 Gill. & J. (Md.) 103, 20 Am. Dec. 463.

<sup>99</sup> *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

<sup>100</sup> *Union Cent. Life Ins. Co. v. Hilliard*, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560; *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Pippen v. Mutual Benefit Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822.

fest," says the court in Massachusetts, "that however reasonable and prudent it may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or within the class of contracts which have been held as matter of law to be beneficial and therefore binding upon an infant. It is only when the contract comes within the class of contracts which as matter of law are binding upon an infant that the question of its reasonableness and prudence is material."<sup>101</sup> But when an infant disaffirms such a policy and sues to recover back the premiums which he has paid under it, the amount which he shall be allowed to recover is a question still unsettled. In Ohio and Massachusetts, it is held that he may recover the entire amount of the premiums paid by him, and that the company cannot retain the cost of keeping the policy in force to date.<sup>102</sup> But on the other hand, in certain well-considered cases in Minnesota, it is ruled that, where an infant obtains insurance on his life in a solvent company, at the usual rates, for an amount commensurate with his estate, and without fraud or undue influence by the company, he cannot, on becoming of age and surrendering the policy, recover the premiums paid so far as they only cover the current risk assumed, since the contract is beneficial to him and he has received benefits under it which he cannot restore.<sup>103</sup>

If the infant assured, instead of repudiating his contract and suing for the recovery of premiums paid, takes the course of surrendering the policy to the company in pursuance of its own provisions, in consideration of receiving its cash surrender value, it is held that neither the infant nor his administrator after his death can disaffirm this arrange-

57 L. R. A. 505; *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643; *Hamm v. Prudential Ins. Co.*, 137 App. Div. 504, 122 N. Y. Supp. 35.

<sup>101</sup> *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.

<sup>102</sup> *Prudential Life Ins. Co. v. Fuller*, 29 Ohio Cir. Ct. R. 415; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.

<sup>103</sup> *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Link v. New York Life Ins. Co.*, 107 Minn. 33, 119 N. W. 488.

ment, and the administrator cannot recover the face value of the policy on the theory that the surrender was a voidable contract by the infant. On the contrary, it is held that the policy itself is a contract voidable at the infant's election, and the surrender of it constitutes a voluntary annulment and cancellation by the infant, so that it cannot be resuscitated or reaffirmed by him or by his personal representatives.<sup>104</sup>

We have also to consider the rights of the beneficiary in a life policy on an infant. And first, it is held that an infant is not bound by his warranties in an application for life insurance, and that the insurer cannot defend an action on the policy by proving their falsity. And neither is the beneficiary in such a policy bound by the infant's warranties, in the absence of fraud, since, in legal effect, not being binding on the infant, they are not a part of the policy. From this it follows that, although the plea of infancy is ordinarily personal to the infant, yet the beneficiary may plead infancy in answer to the company's defense of false warranties, for otherwise the infant's contract of insurance would be in effect binding on him during his minority.<sup>105</sup> Again, an infant beneficiary under a life policy may disaffirm during his minority a settlement made with the company for less than the face value of the policy, and recover the full amount thereof without restitution of the amount received, if he is unable to restore it because it has been spent.<sup>106</sup>

<sup>104</sup> *Pippen v. Mutual Benefit Life Ins. Co.*, 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505. In this case it was also held that the surrender of the policy was not a sale, which the insured or his representatives would be entitled to disaffirm, for the interest of the insured was a contingency not susceptible of delivery, and hence not the subject of sale. Also, that if the surrender of the policy was considered as an assignment, the transfer of the insured's interest to the company rescinded the contract, and that the fact that the infant did not receive the full amount to which he was entitled by the terms of the policy upon the surrender thereof did not give him or his representatives a right to reaffirm the policy, but the surrender rendered it void ab initio, only entitling the insured to be restored to his original status.

<sup>105</sup> *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

<sup>106</sup> *Gonackey v. General Accident, Fire & Life Assur. Corp.*, 6 Ga. App. 381, 65 S. E. 53.



It should be added that, in New York, a statute provides that a minor of the age of fifteen years or upwards, who takes out a policy of insurance on his own life for his own benefit, shall not by reason of minority be deemed incompetent to contract for insurance. It is held that this is not merely declaratory of the common law, which, without making the contract absolutely void, leaves it voidable at the infant's election, but is intended to make the policy, in the case specified, absolutely a binding contract.<sup>107</sup>

§ 296. **Promise to Marry.**—The contract to marry is not one which an infant is capable of entering into with binding effect, although he may have reached such years, short of majority, as will fit him in all ways for the marital and parental relations, and therefore he may repudiate his promise without liability to damages for its breach, even though he accomplished the seduction of the female by his promise.<sup>108</sup> In Louisiana, however, it is provided by statute that "a minor is not restituable [cannot be relieved] against the engagements stipulated in his marriage contract, if they were entered into with the consent or in the presence of those whose consent is requisite for the validity of his marriage."<sup>109</sup> And in general, a marriage settlement made by an infant, at least in so far as regards real estate, though it is voidable at his instance, is not absolutely void, and therefore is capable of ratification.<sup>110</sup>

§ 297. **Contracts for Necessaries.**—Since a minor who is temporarily absent from home, or one who has no parents or friends to support him but has adequate means of his

<sup>107</sup> *Hamm v. Prudential Ins. Co.*, 137 App. Div. 504, 122 N. Y. Supp. 35; *Equitable Trust Co. v. Moss*, 149 App. Div. 615, 134 N. Y. Supp. 533.

<sup>108</sup> *Reish v. Thompson*, 55 Ind. 34; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; *Frost v. Vought*, 37 Mich. 65; *Felbel v. Obersky*, 13 Abb. Prac. (N. S.) (N. Y.) 402; *Hunt v. Peake*, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; *Leichtweiss v. Treskow*, 21 Hun (N. Y.) 487; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523; *Hale v. Ruthven*, 20 Law T. N. S. 404.

<sup>109</sup> Rev. Civ. Code La., art. 2226.

<sup>110</sup> *Temple v. Hawley*, 1 Sandf. Ch. (N. Y.) 153; *Jones v. Butler*, 30 Barb. (N. Y.) 641; *Levering v. Helghe*, 2 Md. Ch. 81.

own, is absolutely compelled to provide himself with the necessities of existence, the rule which makes voidable the contracts of an infant is subject to the exception that a minor cannot repudiate or disaffirm his express or implied promise to pay for articles furnished to him which are necessary for his proper support and maintenance.<sup>111</sup> But this exception is itself subject to important restrictions and limitations. In the first place, at least in respect to such material articles as food, clothing, and the like, a minor cannot bind himself irrevocably by a contract for a future supply of necessities, but a legal liability attaches to his estate only in respect to past transactions. In other words, a minor cannot bind himself by an executory contract for necessities.<sup>112</sup> We have already seen that the promissory note of a minor cannot be repudiated when given in settlement of an outstanding account for necessities,<sup>113</sup> and also that he cannot repudiate a debt for money loaned to him with which to pay for necessities.<sup>114</sup> But it is also held that if an infant sells or exchanges his personal property, he may at any time disaffirm the transaction, although by means of it he procured necessary articles or the means to purchase them.<sup>115</sup> But he may validly assign wages to become due to him under an existing contract, in consideration of a less amount supplied to him for necessities.<sup>116</sup> In the next place, an infant cannot be held liable for anything more than the fair and reasonable value of necessities furnished to him, no matter what he agreed to pay for them.

<sup>111</sup> *Smoot v. Ryan*, 187 Ala. 396, 65 South. 828; *Falconer v. May, Stern & Co.*, 165 Ill. App. 598. "A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them." Civ. Code Cal., § 36; Rev. Civ. Code Mont., § 3593; Rev. Civ. Code N. Dak., § 4016; Rev. Civ. Code S. Dak., § 18; Rev. Civ. Code Idaho, § 2604; Rev. Laws Okl. 1910, § 886.

<sup>112</sup> *Mauldin v. Southern Shorthand & Business University*, 3 Ga. App. 800, 60 S. E. 358; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043.

<sup>113</sup> *Supra*, § 291.

<sup>114</sup> *Supra*, § 290.

<sup>115</sup> *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296.

<sup>116</sup> *McCarty v. Murray*, 3 Gray (Mass.) 578.

The stipulated price cannot be recovered in an action against him, unless shown to have been reasonable.<sup>117</sup>

Again, within the meaning of the law, nothing can be considered as necessary for an infant which is not actually needed at the time. Hence if he is already sufficiently supplied with articles of the particular kind, or if he is living with a parent or guardian, or any one else bound to support and care for him, who is able and willing to furnish him with all that is suitable and necessary to his position in life, he cannot be held liable for anything ordered on his own responsibility, although, under other circumstances, it might be strictly and technically necessary for him.<sup>118</sup> "When it is shown that an infant is supplied with necessities by his parent or guardian, or with funds amply sufficient to secure them, the presumption of law and of reason must be that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was in a state of destitution must take upon himself the burden of proving the allegation."<sup>119</sup> If a minor resides with his parents, there is a presumption that he is fully supplied with necessities, but this may be rebutted by evidence.<sup>120</sup> On the other hand, if he is absent from home, or not under the care of a parent or guardian, or if it appears that his parents have not the means to support him, then he is liable in his own estate for such necessary articles as may be supplied to him.<sup>121</sup>

<sup>117</sup> *Appeal of Ennis*, 84 Conn. 610, 80 Atl. 772; *Gray v. Sands*, 66 App. Div. 572, 73 N. Y. Supp. 322; *International Text Book Co. v. Alberton*, 30 Ohio Cir. Ct. R. 352.

<sup>118</sup> *McAllister v. Gatlin*, 3 Ga. App. 731, 60 S. E. 355; *Turner v. Flagg*, 6 Ind. App. 563, 33 N. E. 1104; *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Brent v. Williams*, 79 Miss. 355, 30 South. 713; *Perrin v. Wilson*, 10 Mo. 451; *Reading v. Wilson*, 38 N. J. Eq. 446; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Kraker v. Byrum*, 13 Rich. (S. C.) 163; *Parsons v. Keys*, 43 Tex. 557.

<sup>119</sup> *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *Pearson v. White*, 13 Ga. App. 117, 78 S. E. 864.

<sup>120</sup> *Hull v. Connolly*, 3 McCord (S. C.) 6, 15 Am. Dec. 612.

<sup>121</sup> *Hunt v. Thompson*, 3 Scam. (Ill.) 179, 36 Am. Dec. 538; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Angel v. McLellan*, 16 Mass. 28, 8 Am. Dec. 118.

As to the significance of the term "necessaries," it is said that it means such things as are necessary to the support, use, or comfort of the minor, as food, clothing, lodging, medical attendance, and such personal comforts as comport with his condition and circumstances in life, including a common school education.<sup>122</sup> The word cannot be taken in any fixed and invariable sense, but must have a certain flexibility to meet the varying conditions of actual life. What would be a comfort or even a luxury for one person may be a virtual necessity for another. There are certain things which are obviously requisite for the maintenance of existence. But it does not follow that the term "necessaries" in this connection must be restricted to such things as are barely sufficient to keep the infant alive, clad, and sheltered. Aside from such matters, its meaning depends upon the social position and situation in life of the individual, the manner of life to which his parents have accustomed him, his associates, the position he is destined to fill, his plans and purposes for the future, and the extent of his own fortune and that of his parents.<sup>123</sup> "The true rule is that all such articles as are purely ornamental are not necessities, and are to be rejected because they cannot be requisite to anyone, and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises whether they were bought for the necessary use of the party in order to support himself properly in that degree, state, and station of life in which he moved. If they were, for such articles an infant may be responsible. That must be a question for the jury, and it is for them to decide whether the articles were of such description or not."<sup>124</sup>

Again, it may make an important difference whether the infant is married or not. It is said that the necessities for an unmarried infant are such as pertain to him individually;

<sup>122</sup> Price v. Sanders, 60 Ind. 310.

<sup>123</sup> International Text Book Co. v. Connelly, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; Gayle v. Hayes' Adm'r, 79 Va. 542; Wallace v. Leroy, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.

<sup>124</sup> Peters v. Fleming, 6 Mees. & W. 42.

those of a married infant are such as pertain to himself and his family; and those of a married infant to whom the law has intrusted his estate are such as pertain to himself, his family, and his estate.<sup>125</sup> Hence a married infant may be liable for the rent of a dwelling house, at least for the time he has actually occupied the premises.<sup>126</sup> And if he is married, keeping house, and farming, the purchase of articles necessary to enable him to make a crop to support himself and his family may be a purchase of necessities.<sup>127</sup> So it may be necessary for an infant to contribute out of his own means to the support of his parents, and if so, he cannot recover back the money so expended.<sup>128</sup> But generally, and aside from these special cases, the "necessity" which justifies holding an infant liable for his contracts and purchases is personal to himself, that is, the articles in question must supply the infant's personal needs. Hence articles purchased by an infant to enable him to carry on a trade or business are not necessities in the technical sense, although the trade or business cannot be carried on without them, and although the infant is dependent on such occupation for his support.<sup>129</sup> And for the same reason, and as the term "necessaries" does not extend to the infant's property or estate, work done and material furnished in repairing a house belonging to him cannot be classed as a technical necessary, however urgent may be the need of such repairs.<sup>130</sup>

<sup>125</sup> *Chapman v. Hughes*, 61 Miss. 339.

<sup>126</sup> *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177.

<sup>127</sup> *Melton v. Katzenstein* (Tex. Civ. App.) 49 S. W. 173.

<sup>128</sup> *Welch v. Welch*, 103 Mass. 562.

<sup>129</sup> *Mason v. Wright*, 13 Metc. (Mass.) 308; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Decell v. Lowenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Love v. Griffith*, 1 Scott, 458. Where an infant owns a store building, the employment of a janitor for it does not come within the description of "necessaries." *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092, Ann. Cas. 1916A, 959. An infant who is the master of a vessel is not liable for beef and provisions supplied his ship. *A. B. v. Fogerty*, 2 Dane's Abr. (Mass.) 25. But in Georgia, an infant who, by permission of his parent, is engaged in farming may contract for fertilizers to be used on his farm. *James v. Sasser*, 3 Ga. App. 568, 60 S. E. 329.

<sup>130</sup> *Mathes v. Dobschuetz*, 72 Ill. 438; *Tupper v. Cadwell*, 12 Metc.

Such things as are articles of mere luxury, as distinguished from suitable comfort and convenience, or serve the minor in no other way than as ornaments or as contributing to his amusement or self-indulgence, are not regarded as necessities, whatever be his station in life or the extent of his fortune. This applies to such articles as jewelry, wines, cigars, the entertainment of friends, and even wearing apparel when extravagant in quantity or price, or unsuitable in character.<sup>181</sup> Whether or not a bicycle is necessary for an infant is a question of fact, depending on his occupation, if any, and other circumstances.<sup>182</sup> A horse may be necessary for a minor, when his physician advises that riding is a form of exercise that will be beneficial or necessary for the preservation of his health,<sup>183</sup> but not when the possession and use of a horse would merely contribute to the minor's enjoyment, or would be an unnecessary luxury, considering his condition in life and the extent of his fortune,<sup>184</sup> and a race horse is not in any case a necessity.<sup>185</sup> A buggy or carriage is not a necessity for any infant who is not engaged in a business requiring the use of it, nor attending school so as to make it necessary for him to ride back and forth.<sup>186</sup> And a journey undertaken by a child without his parent's permission is not a necessary for him.<sup>187</sup> But a minor may validly contract for food and lodging for herself and her child,<sup>188</sup> and where a minor is

(Mass.) 559, 46 Am. Dec. 704; *Freeman v. Bridger*, 49 N. C. 1, 67 Am. Dec. 258.

<sup>181</sup> *Lefils v. Sugg*, 15 Ark. 137; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Glover v. Ott*, 1 McCord (S. C.) 572; *Chapple v. Cooper*, 13 Mees. & W. 252; *Peters v. Fleming*, 6 Mees. & W. 42; *Ryder v. Wombwell*, L. R. 4 Exch. 32; *Wharton v. Mackenzie*, 5 Q. B. 606.

<sup>182</sup> *Rice v. Butler*, 25 App. Div. 388, 49 N. Y. Supp. 494; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265. As to the purchase of an automobile, see *Klaus v. A. C. Thomson Auto & Buggy Co.* (Minn.) 154 N. W. 508.

<sup>183</sup> *Cornelia v. Ellis*, 11 Ill. 584.

<sup>184</sup> *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524, 10 Am. Dec. 637; *Beeler v. Young*, 1 Bibb (Ky.) 519; *House v. Alexander*, 103 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

<sup>185</sup> *Davis v. Caldwell*, 12 Cush. (Mass.) 512.

<sup>186</sup> *Hettington v. Jackson*, 43 Tex. Civ. App. 500, 96 S. W. 108.

<sup>187</sup> *McKanna v. Merry*, 61 Ill. 177.

<sup>188</sup> *McConnell v. McConnell*, 75 N. H. 385, 74 Atl. 875.

away from home, without work or money, the cost of a telegram to his parents, requesting a remittance of money, is a necessity.<sup>139</sup> So the term "necessaries" will clearly include the cost of proper attention to the minor by a physician or a dentist, together with the cost of medicines prescribed by the former, or of dental supplies employed by the latter.<sup>140</sup>

§ 298. **Same; Education.**—Education furnished to an infant may be necessary to him, provided that it is such as is suitable to his wants and his condition.<sup>141</sup> But when it becomes necessary to determine as a matter of law how much schooling is to be regarded as "necessary" in the particular case, then it is proper to inquire what situation in life the minor is required to fill. A knowledge of the learned languages may be necessary for one, while a mere knowledge of reading and writing may be sufficient for another.<sup>142</sup> Hence, while a common-school education is always regarded as necessary,<sup>143</sup> it is otherwise in regard to a classical, collegiate, professional, or technical education. Instruction of the latter kind is not to be regarded as necessary for an infant in the absence of special circumstances showing its suitability with reference to his situation in life, his abilities, his prospects, and the extent of his property or estate.<sup>144</sup> As to a commercial or business education, it is said in a case in Georgia that, in order to determine whether

<sup>139</sup> *Western Union Tel. Co. v. Greer*, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. (N. S.) 525.

<sup>140</sup> *Gibbs v. Poplar Bluff Light & Power Co.*, 142 Mo. App. 19, 125 S. W. 840; *Harris v. Crawley*, 161 Mich. 383, 126 N. W. 421; *McLean v. Jackson*, 12 Ga. App. 51, 76 S. E. 792; *Strong v. Foote*, 42 Conn. 203.

<sup>141</sup> *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255.

<sup>142</sup> *Peters v. Fleming*, 6 Mees. & W. 42.

<sup>143</sup> *Price v. Sanders*, 60 Ind. 310; *Raymond v. Loyl*, 10 Barb. (N. Y.) 489; *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115.

<sup>144</sup> *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537 (collegiate education); *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574 (education in the medical profession); *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115 (course in steam engineering); *Wallin v. Highland Park Co.*, 127 Iowa, 131, 102 N. W. 839, 4 Ann. Cas. 421 (instruction in pharmacy).



a contract by an infant for a course of instruction in stenography was a contract for "necessaries," the evidence must show the condition in life of the student, and that his parents or guardian refused to furnish such alleged necessary.<sup>145</sup> If a contract for instruction in a profession or in the higher branches of education is to be considered as not one for "necessaries" in the particular case, the infant may repudiate it before attaining his majority, and he should then return any books or apparatus furnished to him in connection with the proposed instruction, and will thereupon escape any liability on his contract.<sup>146</sup>

§ 299. **Same; Services of Attorneys at Law.**—Services of counsel are classed as "necessaries" for a minor, in the sense that payment therefor cannot be avoided on the ground of infancy, when the services rendered affect the infant's liberty or personal relief, or his protection against unjust claims or criminal proceedings, and also, according to most of the authorities, when they are necessary for the collection or preservation of his estate and are beneficial thereto.<sup>147</sup> Thus, an infant is bound by a contract under which an attorney renders beneficial services in defending his civil or property rights,<sup>148</sup> or in prosecuting an action for damages for a personal injury to the minor,<sup>149</sup> or in securing the settlement of a claim in favor of the minor for a tort committed against him,<sup>150</sup> or in collecting wages due

<sup>145</sup> *Mauldin v. Southern Shorthand & Business University*, 126 Ga. 681, 55 S. E. 922, 8 Ann. Cas. 130.

<sup>146</sup> *International Text-Book Co. v. McKone*, 133 Wis. 200, 113 N. W. 438; *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255.

<sup>147</sup> *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Haj v. American Bottle Co.*, 182 Ill. App. 636; *Sutton v. Heinzle*, 84 Kan. 756, 115 Pac. 560, 34 L. R. A. (N. S.) 238; *Spencer v. Collins*, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49; *Helps v. Clayton*, 17 C. B., N. S., 553. Compare *Grissom v. Beldleman*, 35 Okl. 343, 129 Pac. 853, 44 L. R. A. (N. S.) 411, Ann. Cas. 1914D, 599. And see *Marx v. Hefner* (Okl.) 149 Pac. 207.

<sup>148</sup> *Slusher v. Weller*, 151 Ky. 203, 151 S. W. 684.

<sup>149</sup> *Hanlon v. Wheeler* (Tex. Civ. App.) 45 S. W. 821.

<sup>150</sup> *Hickman v. McDonald*, 164 Iowa, 50, 145 N. W. 322.

to him.<sup>151</sup> So, where an attorney had successfully prosecuted a minor's claim for damages for a tort, and after the recovery of judgment, the minor attempted to enter into a disadvantageous compromise of the claim, but by the attorney's efforts the full amount was collected, it was held that the services of the attorney were necessary for the infant and therefore should be compensated.<sup>152</sup> But an attorney who contracts with a minor and performs services under the contract is entitled to no more than a reasonable compensation, and he is not entitled to collect the full amount of the fee agreed upon unless it is made to appear that it is no more than the reasonable value of the services rendered.<sup>153</sup>

Cases of this kind appear to furnish an exception to the general rule that a minor is not personally liable even for necessities, if he has a parent who is able and willing to supply his needs. It is held that a parent is not bound to furnish counsel fees for his minor child for the prosecution of an action for the protection of the latter, and from which the child's estate receives all the benefit, and that it is no obstacle to imposing a personal liability upon the infant's estate that the suit was instituted and counsel employed through a next friend, since this is a necessary formality, and if the infant knew of and profited by the proceedings, his promise to pay the necessary counsel fees will be implied.<sup>154</sup> But an attorney who is the guardian of a minor cannot charge a fee against the minor's estate for his services rendered in the collection of a claim for damages in favor of the minor, though such a fee was agreed on before he was appointed guardian.<sup>155</sup> And where the law of the state requires guardians to sue for and receive debts due to their wards, and to represent their wards in all actions

<sup>151</sup> *Vance v. Calhoun*, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111.

<sup>152</sup> *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721.

<sup>153</sup> *Hanlon v. Wheeler* (Tex. Civ. App.) 45 S. W. 821; *Hickman v. McDonald*, 164 Iowa, 50, 145 N. W. 322.

<sup>154</sup> *Crafts v. Carr*, 24 R. I. 397, 53 Atl. 275, 60 L. R. A. 128, 96 Am. St. Rep. 721.

<sup>155</sup> *Appeal of Ennis*, 84 Conn. 610, 80 Atl. 772.

unless some other person is appointed as guardian ad litem or next friend, the services of an attorney in settling the estate of a deceased person in which a minor is interested are not necessities for which the minor is liable, in the absence of an employment of the attorney by the minor's guardian.<sup>156</sup> And it is ruled that an attorney who volunteers his services for a minor, merely at the suggestion of the latter's relatives or friends, cannot ordinarily recover therefor.<sup>157</sup>

**§ 300. Contracts Made for Infants by Third Parties.—**An infant is not bound by any contract made by another person purporting to act for him, unless such person has been appointed his guardian or next friend, or is in some manner authorized by law to act for him.<sup>158</sup> Thus an infant, whose name is signed without lawful authority to a private settlement out of court with the administrator of an estate in which he has a distributive share, may, on coming of age, disaffirm the settlement and cite the administrator to an accounting.<sup>159</sup> It has been held, however, in some cases that, when a contract is beneficial to an infant, the law will put in an acceptance of it for him, even though he is ignorant of its existence.<sup>160</sup>

**§ 301. Estoppel Against Infant.—**The doctrines of estoppel, waiver, and acquiescence do not apply to infants; in the absence of fraud or bad faith, an infant cannot be estopped by anything he does, nor by keeping silence as to his rights, from asserting his true age nor from avoiding his contract by pleading his disability.<sup>161</sup> Thus, if the prop-

<sup>156</sup> *McIsaac v. Adams*, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729. And see *Marx v. Hefner* (Okl.) 149 Pac. 207.

<sup>157</sup> *McIsaac v. Adams*, 190 Mass. 117, 76 N. E. 654, 112 Am. St. Rep. 321, 5 Ann. Cas. 729.

<sup>158</sup> *Slusher v. Weller*, 151 Ky. 203, 151 S. W. 684; *Pittsburg, C., C. & St. L. Ry. Co. v. Haley*, 170 Ill. 610, 48 N. E. 920; *Muehlbach v. Missouri & K. I. Ry. Co.*, 166 Mo. App. 305, 148 S. W. 453.

<sup>159</sup> *Platt's Heirs v. Longworth's Ex'rs*, 27 Ohio St. 159.

<sup>160</sup> *Richards v. Reeves* (Ind. App.) 45 N. E. 624.

<sup>161</sup> *Alvey v. Reed*, 115 Ind. 148, 17 N. E. 265, 7 Am. St. Rep. 418; *Cowle v. Strohmeier*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Wetutzke v. Wetutzke*, 158 Wis. 305, 148 N. W. 1088. But see *Royal v. Grant*, 5 Ga. App. 643, 63 S. E. 708.

erty of an infant is sold by another person, and the infant, knowing of the sale, neglects to state his title to the purchaser, he may still sue for and recover the property from the latter, the law presuming him to be incapable of understanding and protecting his rights.<sup>162</sup> So, where an infant is entitled to an estate in remainder, his father being the tenant for life, and the latter seeks to incumber the estate for the purpose of improving the property, the infant cannot assent to such a contract nor be estopped to dispute it.<sup>163</sup> So, where the plaintiff, who was a minor, owned stock in a corporation which went into voluntary liquidation and transferred its property to defendant corporation, and the plaintiff accepted shares in the defendant company in lieu of his stock in the original corporation, it was held that the fact that the dissolution of the old company and transfer of its stock were made with plaintiff's consent did not estop him from disaffirming his contract on account of his minority, and that he could recover the amount paid for his shares from the defendant corporation.<sup>164</sup> Again, the receipt of money or property by an infant during the course of a transaction does not preclude him from repudiating such transaction.<sup>165</sup> And the giving of a bond by a minor to dissolve an attachment on a stock of goods which he had purchased in part from the attachment plaintiff does not operate as an affirmance of the contract sued on nor as an estoppel.<sup>166</sup> In cases of actual fraud, however, the rule may be different. In one of the decisions, it is said that an infant may be bound by an equitable estoppel if his conduct has been in-

<sup>162</sup> *Norris v. Wait*, 2 Rich. (S. C.) 148, 44 Am. Dec. 283. And see *Butler v. Stark*, 25 Ky. Law Rep. 1886, 79 S. W. 204. But see a discussion of this subject in Bigelow on Estoppel (3d edn.) pp. 515, 516, where the learned author states that "the authorities on the other hand are not few or obscure which maintain the proposition that if an infant of years of discretion having a right to an estate encourage a purchaser to buy it of another without asserting any claim to it, the purchaser will hold it against the infant."

<sup>163</sup> *Missouri Central B. & L. Ass'n v. Eveler*, 237 Mo. 679, 141 S. W. 877, Ann. Cas. 1913A, 486.

<sup>164</sup> *White v. New Bedford Cotton-Waste Corp.*, 178 Mass. 20, 59 N. E. 642.

<sup>165</sup> *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496.

<sup>166</sup> *Sanger v. Hibbard*, 104 Fed. 455, 43 C. C. A. 635.

tentionally fraudulent.<sup>167</sup> In another, it is held that the rule that an infant may bind himself by his actual fraud, but not by mere conduct or by silence when he ought to speak, constitutes an exception to the general rule that an infant cannot bind himself by estoppel, and is confined to cases where the infant is in fact developed to the condition of actual discretion, and to cases of actual fraud and where the contract or transaction is beneficial to him.<sup>168</sup> But in New York, even this exception is rejected, and it is held that an infant cannot be estopped to assert the defense of infancy in an action on a contract, though the facts relied on as an estoppel may constitute a cause of action against him for tort.<sup>169</sup>

§ 302. **Same; Misrepresentations as to Age.**—By the doctrine of the common law, the fact that a minor falsely represents himself to be of full age, in order to induce another to enter into a contract with him, does not give validity to the contract, it being otherwise voidable, nor estop the minor from pleading his infancy when sued upon it, and this rule is still in force in a majority of the states.<sup>170</sup> But in some others the doctrine prevails that if an infant has reached such a stage of development as indicates that he is of full age, or such as might well mislead a person of ordinary prudence, and if he enters into a contract with another, falsely stating that he is of full age, and the other

<sup>167</sup> *Harper v. Utsey* (Tex. Civ. App.) 97 S. W. 508.

<sup>168</sup> *Grauman, Marx & Cline Co. v. Krientz*, 142 Wis. 556, 128 N. W. 50.

<sup>169</sup> *New York Building Loan Banking Co. v. Fisher*, 20 Misc. Rep. 242, 45 N. Y. Supp. 795; *Munger v. Hess*, 28 Barb. (N. Y.) 75.

<sup>170</sup> *Wilkinson v. Buster*, 124 Ala. 574, 26 South. 940; *Baker v. Stone*, 136 Mass. 405; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; *Johnson v. Clark*, 23 Misc. Rep. 346, 51 N. Y. Supp. 238; *New York Building, Loan & Banking Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. Supp. 152; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 310; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532. See also *Rev. Civ. Code La.*, arts. 1872, 2224. And see *Miller v. St. Louis & S. F. R. Co.*, 188 Mo. App. 402, 174 S. W. 166; *F. B. Collins Inv. Co. v. Beard* (Okla.) 148 Pac. 846.

believes his representation to that effect, and if the infant accepts the benefits of the contract, he will then be estopped from claiming the exemption of minority when the contract is sought to be enforced against him.<sup>171</sup> And in at least one state, it is provided by statute that a minor cannot disaffirm a contract where "the other party had good reason to believe the minor capable of contracting." This, however, is only available to a person who, when making the contract, was ignorant of the fact that the other contracting party was a minor.<sup>172</sup> The view has also been expressed that a minor who has procured another to enter into a business transaction with him by means of a false representation as to his age, can have the contract avoided, but only on restoring all that he has received under it,<sup>173</sup> and that such a false representation may lay the basis for an action on the case for deceit.<sup>174</sup> But where an infant makes no misrepresentation as to his age, is not questioned on the point, and does not volunteer any information, the mere fact that the person with whom he deals does not know that he is a minor, or even has reason to believe from his appearance that he is of full age, does not render the contract valid or estop the minor from disaffirming it.<sup>175</sup> And for even stronger reasons, where the agent of a person, in selling goods to a minor, induces him to state his age in the written contract as twenty-one, the infant will not

<sup>171</sup> *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50; *Commander v. Brazil*, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; *Lake v. Perry*, 95 Miss. 550, 49 South. 569; *Ackerman v. Hawkins*, 45 Ind. App. 483, 88 N. E. 616; *Pace v. Cawood*, 33 Ky. Law Rep. 592, 110 S. W. 414; *County Board of Education v. Hensley*, 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N. S.) 643.

<sup>172</sup> Code Iowa, § 3190; *Beller v. Marchant*, 30 Iowa, 350; *First Nat. Bank v. Casey*, 158 Iowa, 349, 138 N. W. 897. And see Gen. St. Kan. 1909, § 5062; *Szwed v. Morris & Co.*, 187 Mo. App. 510, 174 S. W. 146.

<sup>173</sup> *International Land Co. v. Marshall*, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056; *Ackerman v. Hawkins*, 45 Ind. App. 483, 88 N. E. 616.

<sup>174</sup> *New York Building, Loan & Banking Co. v. Fisher*, 23 App. Div. 363, 48 N. Y. Supp. 152.

<sup>175</sup> *Frank Spangler Co. v. Haupt*, 53 Pa. Super. Ct. 545; *Grauman, Marx & Cline Co. v. Krienitz*, 142 Wis. 556, 126 N. W. 50.

thereby be estopped from relying on his infancy as a defense to an action on the contract.<sup>176</sup>

§ 303. **Ratification.**—The contracts of an infant being for the most part voidable only, and not void, he may ratify and confirm them if he elects to do so.<sup>177</sup> But this cannot be done until he has attained his majority, for an attempted ratification of an infant's contract, made while the infancy still continues, would be voidable for precisely the same reason which invalidates the original contract.<sup>178</sup> It has been a debated question whether it is necessary to a valid ratification that the party should have knowledge of his legal right to disaffirm the contract or promise, but the weight of authority inclines to the position that a ratification otherwise sufficient and effective is not rendered nugatory by the fact that the party may not have been aware that he had the privilege of repudiating the engagement.<sup>179</sup> The ratification, however, must be entirely voluntary, and it is not good if made under duress or threats, or extorted by false representations that the person will otherwise be sent to jail.<sup>180</sup> But it is not necessary that there should be any new consideration for the affirmance of the original promise,<sup>181</sup> and the ratification relates back and renders the original contract binding from the time it was made, so that

<sup>176</sup> *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255.

<sup>177</sup> *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Winchester v. Thayer*, 129 Mass. 129; *Jones v. Jones*, 141 Ga. 727, 82 S. E. 451.

<sup>178</sup> *Ex parte McFerren*, 184 Ala. 223, 63 South. 159, 47 L. R. A. (N. S.) 543, Ann. Cas. 1915B, 672; *In re Farley*, 213 N. Y. 15, 106 N. E. 756.

<sup>179</sup> *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. Rep. 687; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *Ring v. Jamison*, 66 Mo. 424; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Morse v. Wheeler*, 4 Allen (Mass.) 570. But compare *Coe v. Moon*, 260 Ill. 76, 102 N. E. 1074; *Norris v. Vance*, 3 Rich. (S. C.) 164.

<sup>180</sup> *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Healy v. Kellogg* (Sup.) 145 N. Y. Supp. 943. But an adult's promise to pay a debt contracted during infancy, made in response to a threat of suit unless payment is made, is not under duress. *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

<sup>181</sup> *Bell v. Burkhalter*, 176 Ala. 62, 57 South. 460.



an action need not be brought upon the new promise.<sup>182</sup> And where the former infant, now of age, has his election either to ratify or to repudiate the contract, his decision once made is final. That is, when he has ratified a contract made in his infancy, he cannot thereafter disaffirm it.<sup>183</sup>

As to the necessity of a ratification and the sufficiency of various forms of ratification, the authorities are not in harmony. Some of the decisions maintain the rule that an executory contract made by an infant does not become valid unless affirmed,<sup>184</sup> but that an executed contract needs no ratification, but is binding until disaffirmed, so that the other party may sue on the contract, and it is then for the infant to plead his minority in defense, and if he does so, the other party may then show anything in the nature of a ratification.<sup>185</sup> In England, the matter of the ratification of infants' contracts is governed by Tenterden's Act (9 Geo. IV, c. 14), which is in the nature of an extension of the statute of frauds, and which, on this point, provides that such a ratification, to be available in an action, must be in writing and signed by the party to be charged; and this provision, or one substantially similar to it, has been adopted in the laws of several of the states.<sup>186</sup> But in the absence

<sup>182</sup> *Minock v. Shortridge*, 21 Mich. 304; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229.

<sup>183</sup> *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848; *Healy v. Kellogg* (Sup.) 145 N. Y. Supp. 943; Rev. Civ. Code La. art. 2228.

<sup>184</sup> *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536.

<sup>185</sup> *Henry v. Root*, 33 N. Y. 526; *Clemmer v. Price*, 59 Tex. Civ. App. 84, 125 S. W. 604.

<sup>186</sup> See *Proctor v. Sears*, 4 Allen (Mass.) 95; *Fetrow v. Wiseman*, 40 Ind. 148; *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518; *Carroll v. Durant Nat. Bank*, 38 Okl. 267, 133 Pac. 179; *Barnes v. American Soda Fountain Co.*, 32 Okl. 81, 121 Pac. 250; *Lamkin v. Ledoux*, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104. The statute in Missouri (Rev. St. 1899, § 3423) provides that no action shall be maintained to charge a person on a debt contracted during infancy, unless the debt shall have been ratified otherwise than by a verbal promise, and that the following acts shall constitute a ratification: An acknowledgment in writing, a partial payment, a disposal of the property for which the debt was contracted, and a refusal to deliver property in defendant's possession, for which such debt was contracted, to the person to whom the debt is due. And it is held that, since this provision is directly opposed to the common-law doctrine of ratification of infants' contracts, it must be construed as exclu-

of such a statute, ratification of a contract voidable for infancy may be effected in several ways. In the first place, acceptance of the contract as a binding obligation is sufficient if shown by the person's continuing to act under it without demur. Thus, if one contracts while an infant to render services to another, and continues in the employment after coming of age without demanding increased wages or proposing any other change, it is evidence of an affirmance of the contract.<sup>187</sup> But the rule is generally accepted that mere acquiescence and silence by the person after attaining full age is not a ratification of a contract made by him during his minority, however long such acquiescence continues, short of the statutory period of limitations.<sup>188</sup> It is said by the Supreme Court of the United States: "We think the preponderance of authority is that, in deeds executed by infants, mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intention to assent to the conveyance, will not bar the infant's right to avoid the deed, and those confirmatory acts must be voluntary."<sup>189</sup> And a ratification cannot be inferred from incidental or collateral circumstances, in the face of an explicit declaration of the party that he did not intend to become bound.<sup>190</sup>

In the next place, if a person, after attaining his majority, retains for an unreasonable length of time property acquired under a contract made while he was an infant, or continues in the enjoyment of any adequate benefit received under the contract, or exercises clear acts of ownership over such property, it is held that he thereby ratifies the

sive, and evidence of a common-law ratification by means other than those prescribed is inadmissible. *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509.

<sup>187</sup> *Spicer v. Earl*, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152.

<sup>188</sup> *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N. S.) 1115; *Lynch v. Johnson*, 109 Mich. 640, 67 N. W. 908; *Watson v. Peebles*, 102 Miss. 725, 59 South. 881; *Headley v. Hoopengartner*, 60 W. Va. 626, 55 S. E. 744.

<sup>189</sup> *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Drake v. Ramsay*, 5 Ohio, 251.

<sup>190</sup> *Minock v. Shortridge*, 21 Mich. 304.

contract,<sup>191</sup> and this is more particularly the case if, after coming of age, he sells such property as his own.<sup>192</sup> Again, a partial payment made on a contract after the person reaches his majority constitutes a ratification of it, provided it is made in pursuance of what the party recognizes as a legal obligation.<sup>193</sup> And the same result may be effected by bringing a suit on the contract.<sup>194</sup> Finally, a ratification may of course be made by a direct and explicit act or declaration directed to that purpose. No particular form of words is required, but the language employed must import an unequivocal recognition and confirmation of the previous engagement. If they satisfy this requirement, there need not be any direct promise to pay or perform.<sup>195</sup> Thus, any written instrument signed by a party which, in the case of an adult, would amount to an adoption of the act of an agent, will, in the case of an infant, after he has attained full age, amount to a ratification.<sup>196</sup> But a ratification is not made out by evidence that the person, after coming of age, said that the debt was a just one and that he would pay it if he ever could do so without inconvenience to himself, but that he would not promise to pay it at any definite time.<sup>197</sup> And the signing of a bond to release merchandise bought while a minor from attachment at the suit of the vendor is not a ratification of a promise to pay made while a minor.<sup>198</sup> So, where an infant executed a written contract

<sup>191</sup> *Hobbs v. Hinton Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 82 S. E. 267; *Norris v. Vance*, 3 Rich. (S. C.) 164; *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881, 36 L. R. A. (N. S.) 57; *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S. E. 756; *La Cotts v. Quertermous*, 84 Ark. 610, 107 S. W. 167; *Gannon v. Manning*, 42 App. D. C. 206.

<sup>192</sup> *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509.

<sup>193</sup> *Snyder v. Gerlicke*, 101 Mo. App. 647, 74 S. W. 377; *Parsons v. Teller*, 188 N. Y. 318, 80 N. E. 930.

<sup>194</sup> *Ward v. The Little Red*, 8 Mo. 358; *Pecararo v. Pecararo* (Sup.) 84 N. Y. Supp. 581; *Wise v. Loeb*, 15 Pa. Super. Ct. 601.

<sup>195</sup> *Ward v. Scherer*, 96 Va. 318, 31 S. E. 518; *Thompson v. Lay*, 4 Pick. (Mass.) 48, 16 Am. Dec. 325.

<sup>196</sup> *Pedro v. Pedro*, 71 Misc. Rep. 296, 127 N. Y. Supp. 997.

<sup>197</sup> *Bresee v. Stanly*, 119 N. C. 278, 25 S. E. 870.

<sup>198</sup> *Lamkin v. Ledoux*, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104.

of guaranty, and after he became of age wrote a letter asking that an itemized bill be sent to him, it was considered that this did not amount to a ratification such as to make him liable on the guaranty.<sup>199</sup>

§ 304. **Disaffirmance or Rescission.**—No particular manner of disaffirmance by an infant of a contract made by him is necessary; any act which clearly shows his renunciation of the contract and his intention not to be bound by it is sufficient to avoid it.<sup>200</sup> This result may be accomplished by his giving notice to the other party to the contract that he considers it void, with an offer to return the consideration received.<sup>201</sup> An infant's deed of land may be disaffirmed not only by an express notice to that effect, followed by resumption of the possession, but also by his executing a deed of the same property to a different grantee after attaining his majority. But whether or not the making of such second conveyance without re-entry, the grantor not being in actual possession, will effectually avoid the first deed, depends upon the local law.<sup>202</sup> So where an infant has given a chattel mortgage, an unconditional sale and delivery of the property to a third person is such an act as will avoid the mortgage.<sup>203</sup> But where an infant gives a mortgage on his lands, and, after reaching his majority, executes a quit-claim deed of the same land to a third person, the deed will not be taken as a disaffirmance of the mortgage, since the two conveyances are not inconsistent with each other, the deed being understood as conveying

<sup>199</sup> *H. C. Miner Lithographing Co. v. Santley* (Sup.) 150 N. Y. Supp. 71.

<sup>200</sup> *Barnes v. Barnes*, 50 Conn. 572; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354); *Heath v. West*, 26 N. H. 191; *State v. Plaisted*, 43 N. H. 413; *Skinner v. Maxwell*, 66 N. C. 45; *Groesbeck v. Bell*, 1 Utah, 338.

<sup>201</sup> *Willis v. Twambly*, 13 Mass. 204.

<sup>202</sup> *Riggs v. Fisk*, 64 Ind. 100; *Vallandingham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536; *Eagle Fire Ins. Co. v. Lent*, 6 Paige (N. Y.) 635; *Hoyle v. Stowe*, 19 N. C. 320; *Cresinger v. Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *McGill v. Woodward*, 3 Brev. (S. C.) 401.

<sup>203</sup> *Chapin v. Shafer*, 49 N. Y. 407.

only the equity of redemption.<sup>204</sup> If the contract in question was one by which the infant parted with his property by sale or otherwise, he may repudiate it by repossessing himself of the property, if he can do so without crime or a breach of the peace,<sup>205</sup> or he may maintain an action for its conversion, if the return of it to his possession has first been demanded and refused,<sup>206</sup> or it is said that the mere institution of an action of replevin will suffice for a disaffirmance of the contract, even though not prosecuted to final judgment.<sup>207</sup> If the contract was one by which the infant acquired property from another, he may disaffirm it by returning the property to the possession of its former owner, or offering to do so, making clear his intention to renounce all interest in it, and demanding the restoration of any consideration he may have given.<sup>208</sup> Again, the plea of infancy may be set up in defense to an action upon any contract or obligation which is voidable on that ground, without the necessity of first formally disaffirming or repudiating it; the plea of infancy is in itself an exercise of the election to avoid the contract and a sufficient disaffirmance.<sup>209</sup> So also, in many cases the institution of a suit by a minor will be considered as sufficient notice of his intention to disaffirm a contract and also as the equivalent of a more formal disaffirmance. Thus, by bringing an action to recover back money paid on a contract of sale, an infant elects to rescind the contract.<sup>210</sup> And if an infant has been in the employment of another under an agreement to render certain services for a fixed compensation, his act in suing for the value of his services on a quantum meruit is

<sup>204</sup> *Singer Mfg. Co. v. Lamb*, 81 Mo. 221.

<sup>205</sup> *Utz v. Commonwealth*, 3 Ky. Law Rep. 88.

<sup>206</sup> *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354).

<sup>207</sup> *Stotts v. Leonhard*, 40 Mo. App. 336.

<sup>208</sup> *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *McCarthy v. Henderson*, 138 Mass. 310; *Edgerton v. Wolf*, 6 Gray (Mass.) 453; *Hoyt v. Wilkinson*, 57 Vt. 404.

<sup>209</sup> *Buzzell v. Bennett*, 2 Cal. 101; *King v. Barbour*, 70 Ind. 35; *Pakas v. Racy*, 13 Daly (N. Y.) 227; *Exchange Bank v. McMillan*, 76 S. C. 561, 57 S. E. 630.

<sup>210</sup> *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350. See *Gray v. Lessington*, 15 N. Y. Super. Ct. 257; *Carmody v. Patchell*, 42 App. D. C. 426.

a repudiation of the contract.<sup>211</sup> So if an infant has a claim against another for damages for personal injuries, and is induced to execute a release, it is voidable on account of his minority, and if he brings an action for the damages, it is a sufficient disaffirmance of the release.<sup>212</sup> So also, in a leading case on this subject, where the plaintiffs sued to recover land, and alleged in their complaint that an award under which defendants claimed title, and to which the plaintiffs were parties, being then infants, was rendered in a collusive and fraudulent suit and was void, it was held that this constituted a sufficient disaffirmance of the arbitration and award.<sup>213</sup> It also appears to be the rule, though the point is not free from doubt, that an infant may effect the rescission of a contract, which is voidable at his option, through the intervention of an agent appointed by him for that purpose.<sup>214</sup>

§ 305. **Who may Rescind or Avoid.**—Infancy is a personal privilege, of which no one can take advantage but the infant himself.<sup>215</sup> The only apparent exceptions to this rule are found in the case where the minor dies after the transaction in question and before attaining his majority. In this event, his executor or administrator may avoid or repudiate the transaction just as the infant might have done had he lived,<sup>216</sup> and also it seems that the same privilege is accorded to his privies in blood, who would be entitled to

<sup>211</sup> *Fisher v. Kissinger*, 27 Ohio Cir. Ct. R. 13.

<sup>212</sup> *Born v. Chicago City Ry. Co.*, 159 Ill. App. 585; *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 44 Ark. 293; *Arizona Eastern R. Co. v. Carillo* (Ariz.) 149 Pac. 313.

<sup>213</sup> *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496.

<sup>214</sup> *Towle v. Dresser*, 73 Me. 252.

<sup>215</sup> *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Hill v. Taylor*, 125 Mo. 331, 28 S. W. 599; *Voorhees v. Wait*, 15 N. J. Law, 343; *Van Bramer v. Cooper*, 2 Johns. (N. Y.) 279; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660; *Love v. Dobson*, 5 Wkly. Notes Cas. (Pa.) 359; *Rose v. Daniel*, 3 Brev. (S. C.) 438; *Marlin v. Kosmyroski* (Tex. Civ. App.) 27 S. W. 1042; *Putnam v. Hill*, 38 Vt. 85.

<sup>216</sup> *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103; *Parsons v. Hill*, 8 Mo. 135; *Frazier v.*

the estate upon the avoidance of the contract, but not to those who are privies in estate only,<sup>217</sup> or at least, as to the latter, it is held that persons in privity of estate with an infant cannot avail themselves of his privilege of infancy for the mere purpose of setting up irregularities of which the infant has not complained.<sup>218</sup> In pursuance of the general rule, it is held that the maker of a note cannot defend an action brought by an indorsee on the ground that the payee was an infant,<sup>219</sup> and an adult indorser of a note cannot release himself from liability on the plea that the maker of the note was an infant.<sup>220</sup> So, where one sells goods to a minor, retaining title until payment, and the infant sells them to a third person, an action of trover against the latter cannot be defended on the ground of the infancy of the original buyer.<sup>221</sup> In an action of assumpsit on a promise to pay the debt of another, the infancy of the debtor is no defense,<sup>222</sup> and the infancy of a principal contractor, though set up by the infant and available in his own defense, will not protect his sureties.<sup>223</sup> So, an agreement by which an infant, in consideration of cash furnished him, assigns his wages to become due under an existing contract cannot be avoided by his creditors.<sup>224</sup> And the privilege of infancy cannot be set up by a purchaser at a sale under an execution to defeat prior transactions of the judgment debtor.<sup>225</sup> Further, where one of the joint parties to a contract is an infant, the fact that he may and does avoid the transaction so far as concerns himself by pleading his infancy does not

**Massey**, 14 Ind. 382; **Lester v. Frazer**, 2 Hill Eq. (S. C.) 529; **Harris v. Musgrove**, 59 Tex. 401; **Counts v. Bates**, Harp. (S. C.) 464.

<sup>217</sup> **Bozeman v. Browning**, 31 Ark. 364; **Nelson v. Eaton**, 1 Redf. Sur. (N. Y.) 498; **Gillenwaters v. Campbell**, 142 Ind. 529, 41 N. E. 1041; **Levering v. Heighe**, 2 Md. Ch. 81.

<sup>218</sup> **Harris v. Ross**, 112 Ind. 314, 13 N. E. 873.

<sup>219</sup> **Garner v. Cook**, 30 Ind. 331; **Dulty v. Brownfield**, 1 Pa. 497.

<sup>220</sup> **Parker v. Baker**, 1 Clarke Ch. (N. Y.) 136.

<sup>221</sup> **Elder v. Woodruff Hardware & Mfg. Co.**, 9 Ga. App. 484, 71 S. E. 806; **Holmes v. Rice**, 45 Mich. 142, 7 N. W. 772.

<sup>222</sup> **Hesser v. Steiner**, 5 Watts & S. (Pa.) 476.

<sup>223</sup> **Parker v. Baker**, 1 Clarke Ch. (N. Y.) 136.

<sup>224</sup> **McCarty v. Murray**, 3 Gray (Mass.) 578.

<sup>225</sup> **Alsworth v. Cordtz**, 31 Miss. 32.



in any way affect the liability of the others.<sup>226</sup> So an agreement to arbitrate a dispute as to the interest of a deceased partner in a firm, entered into between his widow and the surviving partner, cannot be repudiated by the latter because it does not bind the decedent's minor children.<sup>227</sup> And in an action to recover personal property given by the plaintiff in payment for a machine, on the ground that the plaintiff was a minor at the time the contract was made, the contract will not be avoided where it appears that the minor was not acting on his own behalf, but as agent for his father.<sup>228</sup>

**§ 306. Same; Adult Contracting with Infant is Bound.** An adult who enters into a contract with an infant does so at his own risk and remains bound by the contract unless the infant elects to disaffirm it. The privilege of rescission is with the infant alone, and if he chooses to abide by the contract, the other party cannot allege the minority of his opponent as a ground for his own refusal to perform or to escape liability on his own part.<sup>229</sup> Thus, in an illustrative case, it appeared that the plaintiff, in pursuance of his contract to convey, delivered to defendant a deed from the owner of the property, who was a minor. In an action on the contract, the defendant set up as a defense that he feared that the minor would disaffirm the contract on coming of age, but he did not claim to have been misled, or that he was ignorant of the true state of the title at the time of the purchase. It was held that the defense was insufficient, the minority of the vendor being no ground for a rescission of the contract at the instance of the vendee.<sup>230</sup> On the same principle, liability on a policy of insurance on the

<sup>226</sup> *Barlow v. Wiley*, 3 A. K. Marsh. (Ky.) 457; *Blake v. Livingston County Sup'rs*, 61 Barb. (N. Y.) 149; *Arnous v. Lesassier*, 10 La. 592, 29 Am. Dec. 470.

<sup>227</sup> *Chambers v. Ker*, 6 Tex. Civ. App. 373, 24 S. W. 1118.

<sup>228</sup> *Shaffer v. Kennington*, 61 Ill. App. 59.

<sup>229</sup> *Smoot v. Ryan*, 187 Ala. 396, 65 South. 828; *Chapman v. Duffy*, 20 Colo. App. 471, 79 Pac. 746; *Lafollett v. Kyle*, 51 Ind. 446; *Anderson's Adm'r v. Birdsall's Adm'r*, 19 La. 441; *Reichard v. Izer*, 95 Md. 451, 52 Atl. 592; *Widrig v. Taggart*, 51 Mich. 103, 16 N. W. 251; *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

<sup>230</sup> *Dentler v. O'Brien*, 56 Ark. 49, 19 S. W. 111.

property of an infant cannot be evaded on the ground that the infant is not bound.<sup>231</sup> And where two persons, one an adult and the other a minor, execute notes for the price of land conveyed to them jointly, the adult will be liable though the infant is not.<sup>232</sup> And although a minor who is a member of a partnership can avoid the partnership agreement, his adult partner has not that privilege.<sup>233</sup> It has been held, however, that where a contract of bailment was made with the bailee by the agent of an undisclosed principal, and it is discovered that such principal is a minor, the bailee may rescind on returning the goods.<sup>234</sup> It is also very important to observe that if the adult party to a contract has any other good and sufficient reason for rescinding it, such, for instance, as false and fraudulent representations made to induce him to enter into it, the minority of the other party to the contract will not prevent its rescission on the stated grounds.<sup>235</sup> It would appear that this rule should also apply to the case where both the parties to a contract are minors. Each should have the privilege of avoiding it, not on the ground of the other's minority, but of his own.

**§ 307. Time for Rescinding or Disaffirming; During Minority.**—If an infant is incapable of making an irrevocably binding contract in regard to a particular subject, it might be thought that he also lacked the legal capacity to rescind such a contract during his minority. And authorities in support of this view are not wanting. In one case it was said: "In general he cannot while an infant, unless in case of evident necessity, disaffirm a contract made by him, as the same want of discretion which prevents him from making a binding contract would prevent him from avoiding one which might be beneficial to him. He is incapable in the latter as in the former case of judging what is for his benefit."<sup>236</sup> So again, "whether an avoidance during mi-

<sup>231</sup> *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

<sup>232</sup> *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762.

<sup>233</sup> *Winchester v. Thayer*, 129 Mass. 129.

<sup>234</sup> *Stiff v. Keith*, 143 Mass. 224, 9 N. E. 577.

<sup>235</sup> *Pritchett v. Fife*, 8 Ala. App. 462, 62 South. 1001.

<sup>236</sup> *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327.

nority is final is doubtful. On the ground that an infant's contract, unless for necessities, does not absolutely bind, it would seem that he is not absolutely bound by his rescission of a contract, but that such rescission is open to repudiation by him when at full age."<sup>237</sup> So it is held in New York that the courts should not prevent the disaffirmance of a contract by a minor before attaining his majority, unless the contract is of a beneficial character to him,<sup>238</sup> and in the District of Columbia, that the object of the general rule deferring the act of avoidance by an infant of a contract made by him until his coming of age is his protection, and when it is apparent to the court that delay will work injury to the infant, the power of repudiation may be exercised by the court immediately.<sup>239</sup> In Massachusetts, it is held that the bringing of an action to recover back what the infant has paid under the contract would probably be in itself a sufficient rescission, even while he remains a minor, but that, at any rate, notice of the infant's rescission of the contract, with demand for restoration of his money, may be made through an attorney employed by him for that purpose, and his appointment of the attorney and the acts of the latter thereunder will be good, at least until avoided by the infant.<sup>240</sup> There are also a number of decisions holding that a conveyance of real estate cannot be disaffirmed or avoided by an infant until he has reached his majority.<sup>241</sup>

But these opinions are contrary to the very great preponderance of authority. The rule is almost universally accepted that, in the case of executory contracts and such as relate to personal property, and generally in other cases than the transfer of realty, an infant may disaffirm his contract at any time, and during his minority as well as after

<sup>237</sup> 1 Whart. Contr. § 34, citing *Northwestern R. R. v. McMichael*, 5 Exch. 114; *Dunton v. Brown*, 31 Mich. 182.

<sup>238</sup> *Aborn v. Janis*, 62 Misc. Rep. 95, 113 N. Y. Supp. 309.

<sup>239</sup> *Adriaans v. Dill*, 37 App. D. C. 59.

<sup>240</sup> *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.

<sup>241</sup> *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Shipman v. Horton*, 17 Conn. 481; *Welch v. Bunce*, 83 Ind. 382; *Baker v. Kennett*, 54 Mo. 82.

he comes of age.<sup>242</sup> This is also the rule established by statute in several of the states. These statutes provide that, except in the case of contracts for necessities and contracts made under the authority of a statute, the contract of a minor may be disaffirmed by the minor himself either before he reaches his majority or within a reasonable time (or in some states a limited time) afterwards, or, in case of his death within that period, by his heirs or personal representatives.<sup>243</sup> In Iowa, the provision of the statute is that a minor shall be bound by his contracts "unless he disaffirms them within a reasonable time after he attains his majority." But it is held that this does not prevent a disaffirmance during minority, as allowed by the rule of the common law, but only fixes a limit to the time when it may be made.<sup>244</sup>

<sup>242</sup> *In re Hunttenberg* (D. C.) 153 Fed. 768; *Ex parte McFerren*, 184 Ala. 223, 63 South. 159, 47 L. R. A. (N. S.) 543, Ann. Cas. 1915B, 672; *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 201; *Bell v. Swainsboro Fertilizer Co.*, 12 Ga. App. 81, 76 S. E. 756; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; *Tucker v. Eastridge*, 51 Ind. App. 632, 100 N. E. 113; *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496; *Towle v. Dresser*, 73 Me. 252; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354); *Heath v. West*, 26 N. H. 191; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Stafford v. Roof*, 9 Cow. (N. Y.) 626 (but see *Gray v. Lessington*, 15 N. Y. Super. Ct. 257); *Hel-land v. Colton State Bank*, 20 S. D. 325, 106 N. W. 60; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Cummings v. Powell*, 8 Tex. 80; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Hoyt v. Wilkinson*, 57 Vt. 404; *Covault v. Nevitt*, 157 Wis. 113, 146 N. W. 1115, 51 L. R. A. (N. S.) 1092, Ann. Cas. 1916A, 959. In Michigan, it appears that an infant, during his minority, may rescind his purchase of personal property for fraud on the part of the seller. *Patterson v. Kasper*, 182 Mich. 281, 148 N. W. 690, L. R. A. 1915A, 1221; *Stoll v. Hawks*, 179 Mich. 571, 146 N. W. 229, 51 L. R. A. (N. S.) 28. But in other cases there can be no binding rescission or repudiation until the attainment of majority. *Lansing v. Michigan Cent. R. Co.*, 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567; *Dunton v. Brown*, 31 Mich. 182.

<sup>243</sup> Civ. Code Cal., § 35; Rev. Civ. Code N. Dak., § 4015; Rev. Civ. Code S. Dak., § 17; Rev. Civ. Code Idaho, § 2603; Rev. Laws Okl. 1910, § 885; Rev. Civ. Code Mont., § 3592.

<sup>244</sup> *Childs v. Dobbins*, 55 Iowa, 205, 7 N. W. 496. But compare *Murphy v. Johnson*, 45 Iowa, 57.

§ 308. **Same; After Attaining Majority.**—It has sometimes been maintained that, in the absence of special equitable considerations, a minor has the full period of the statute of limitations after becoming of age within which to disaffirm a contract made in his infancy.<sup>245</sup> But a majority of the decisions reject this arbitrary rule, and hold that the disaffirmance must be made within a reasonable time after the infant attains his majority, irrespective of the statute of limitations, and that if there is unreasonable delay, it will be held equivalent to a ratification.<sup>246</sup> “In every other case of a right to disaffirm,” says the court in Minnesota, “the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant’s protection. That ten, fifteen, or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him is absurd. \* \* \* Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend upon the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court.”<sup>247</sup> This is also the rule prescribed by statute in

<sup>245</sup> *Chicago Telephone Co. v. Schulz*, 121 Ill. App. 573; *Watson v. Peebles*, 102 Miss. 725, 59 South. 881.

<sup>246</sup> *In re Hunttemberg* (D. C.) 153 Fed. 768; *Wiley v. Wilson*, 77 Ind. 596; *Stucker v. Yoder*, 33 Iowa, 177; *Seeley v. Seeley-Howe-Le Van Co.*, 128 Iowa, 294, 103 N. W. 961; *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216; *Krbel v. Krbel*, 84 Neb. 160, 120 N. W. 935; *Wise v. Loeb*, 15 Pa. Super. Ct. 601; *Groesbeck v. Bell*, 1 Utah, 338. And see *Chambers v. Chattanooga Union Ry. Co.*, 130 Tenn. 459, 171 S. W. 84; *Hobbs v. Hinton Foundry, Machine & Plumbing Co.*, 74 W. Va. 443, 82 S. E. 267; *Gannon v. Manning*, 42 App. D. C. 206.

<sup>247</sup> *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798.

several of the states,<sup>248</sup> though in a few it is provided that the disaffirmance must be made within one year after the infant reaches his majority.<sup>249</sup>

As above stated, the question what constitutes a reasonable time within which to repudiate a contract is one which must depend upon the circumstances of the particular case, taking into account the nature of the contract, the situation of the parties, and all other pertinent considerations.<sup>250</sup> Hence the decisions of the courts cannot be expected to furnish any definite rule on this point. Some of them are cited here merely as illustrations of the way in which different judges have looked at the question. It is said, for instance, that thirty-two days after attaining his majority is a "reasonable time" within which to disaffirm a contract made in infancy,<sup>251</sup> and that eighteen months is not unreasonably long where the matter in question is a note which the infant signed as surety only, receiving no consideration.<sup>252</sup> But on the other hand, it has been ruled that an infant who does not repudiate his promissory note within six months after he comes of age has waited too long,<sup>253</sup> and that the same delay is equally fatal where the contract in question concerned his share in the distribution of an estate.<sup>254</sup> It seems that any ordinary contract which is allowed to remain in force for three, four, or five years after the infant comes of age has not been disaffirmed within a reasonable time.<sup>255</sup> Where the transaction was a conveyance of realty, which has passed into the hands of a third person, one decision holds that it cannot be avoided two years after the

<sup>248</sup> Civ. Code Cal., § 35; Rev. Civ. Code Idaho, § 2603; Rev. Civ. Code Mont., § 3592.

<sup>249</sup> Rev. Civ. Code N. Dak., § 4015; Rev. Civ. Code S. Dak., § 17; Rev. Laws Okl. 1910, § 885. See *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848.

<sup>250</sup> *Darlington v. Hamilton Bank*, 63 Misc. Rep. 289, 116 N. Y. Supp. 678; *Jenkins v. Jenkins*, 12 Iowa, 195; *Groesbeck v. Bell*, 1 Utah, 338.

<sup>251</sup> *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. 109.

<sup>252</sup> *Johnson v. Storle*, 32 Neb. 610, 49 N. W. 371.

<sup>253</sup> *Hoover v. Kinsey Plow Co.*, 55 Iowa, 668, 8 N. W. 658.

<sup>254</sup> *Jones v. Jones*, 46 Iowa, 466.

<sup>255</sup> *Green v. Wilding*, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696; *Meriweather's Adm'r v. Herran*, 8 B. Mon. (Ky.) 162.

minor comes of age,<sup>256</sup> while another maintains that a delay of two years in such a case does not constitute laches.<sup>257</sup>

**§ 309. Partial Avoidance or Disaffirmance.**—When the circumstances are such that a person, on reaching his majority, has the option and the opportunity to affirm or to disaffirm a contract made by him while an infant, he must either affirm it as an entirety or else repudiate it altogether. He cannot avoid it in so far as it is disadvantageous to him or imposes liabilities or burdens upon him, and at the same time claim to affirm it in so far as it is beneficial to him.<sup>258</sup> Thus, for example, a minor cannot, by the plea of infancy, avoid a chattel mortgage given to secure money due for personal property purchased by him without also avoiding the sale.<sup>259</sup> “Where an infant purchases a chattel, and at the same time and in part performance of the contract of purchase, executes a mortgage on the purchased property to secure the payment of the purchase money, it is not within the privilege of infancy to avoid the security given without also avoiding the purchase. If in such a case the infant would rescind a part he must rescind the whole contract, and thereby restore to his vendor the title acquired by the purchase. The privilege of infancy may be used as a shield, but not as a sword.”<sup>260</sup> And the same rule is applied where an infant receives a deed of land and gives a mortgage to secure the purchase money; he cannot avoid the mortgage and affirm the deed, but the whole transaction must stand or fall together.<sup>261</sup> So, a person cannot disaffirm an agreement, made while he was a minor, that a judgment with a condition should be rendered in his favor, and have the benefit of the judgment without the

<sup>256</sup> *Deason v. Boyd*, 1 Dana (Ky.) 45.

<sup>257</sup> *Brantley v. Wolf*, 60 Miss. 420.

<sup>258</sup> *Corey v. Burton*, 32 Mich. 30; *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275; *State v. City of New Orleans*, 105 La. 768, 30 South. 97. See *Alabama Great Southern R. Co. v. Bonner* (Ala.) 39 South. 619.

<sup>259</sup> *Heath v. West*, 28 N. H. 101; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 854). And see *Stotts v. Leonhard*, 40 Mo. App. 336.

<sup>260</sup> *Curtiss v. McDougal*, 26 Ohio St. 66.

<sup>261</sup> *Richardson v. Boright*, 9 Vt. 368.



condition.<sup>262</sup> And where an infant has bought goods under a contract of conditional sale, and has broken the condition, and the seller brings replevin to recover possession of the property, the minor cannot avoid the contract of sale and yet retain the goods.<sup>263</sup> Conversely, if the minor was the seller and affirms the contract, after coming of age, by bringing suit on the notes given him, he cannot, on his plea of infancy, preclude the defendant from taking advantage of a false warranty in any proper manner as a defense.<sup>264</sup>

§ 310. **Restoration of Property or Consideration Received.**—Whether the rescission or repudiation of a contract made by a minor should be conditioned upon his refunding the money, or restoring the property or other consideration, received by him under the contract, is one of the vexed questions of the law. In some of the states the matter has been regulated by statute. Thus, in Montana, the provision is that, except in the case of contracts for necessities and contracts made under the authority of a statute, “the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed.”<sup>265</sup> In several other states, “if the contract be made by the minor when he is over the age of eighteen, it may be disaffirmed upon restoring the consideration to the party from whom it was received or paying its equivalent.”<sup>266</sup> In Louisiana, when persons under disabilities, including that of minority, are permitted to repudiate their engagements, “the reimbursement of what may have been paid, in consequence of those engagements, during minority, cannot be required of them, unless it be proved that what was paid accrued to their benefit.”<sup>267</sup> In Iowa, a person who rescinds his contract because made in his minority is required

<sup>262</sup> *Lowry v. Drake's Heirs*, 1 Dana (Ky.) 46.

<sup>263</sup> *Robinson v. Berry*, 93 Me. 320, 45 Atl. 34.

<sup>264</sup> *Morrill v. Aden*, 19 Vt. 505.

<sup>265</sup> Rev. Code Mont., § 3592.

<sup>266</sup> Civ. Code Cal., § 35; Rev. Civ. Code N. Dak., § 4015; Rev. Civ. Code S. Dak., § 17; Rev. Civ. Code Idaho, § 2603; Rev. Laws Okl. 1910, § 885. See *Combs v. Hawes* (Cal.) 8 Pac. 597; *Luce v. Jestrab*, 12 N. D. 548, 97 N. W. 848.

<sup>267</sup> Rev. Civ. Code La., art. 2229. See *Daquin v. Colron*, 6 Mart. N. S. (La.) 674.

to restore "property received remaining in his control after attaining majority," and this is construed as not requiring any restoration at all when the rescission is demanded before the minority comes to an end,<sup>268</sup> and in any case as requiring only a return of the identical money received (if the consideration was money) and not its equivalent.<sup>269</sup>

By the rule of the common law, sometimes called the "English rule," which is recognized by many of the American decisions, and is unquestionably in force in several of our states, a person cannot rescind his contract because made while he was a minor and at the same time retain the consideration or benefit which he may have received under it; that is, if he wishes to repudiate his contract and to free himself from any further liability on it, or to recover money which he has paid or property which he has parted with under the contract, he must be prepared, on his part, to restore to the other party any money or property which he has received from him, and if, in the particular case, the benefits received by the infant under the contract are of such a nature that they cannot be restored or returned, so that the other party cannot be placed in statu quo, then there can be no rescission.<sup>270</sup> But on the other hand, many

<sup>268</sup> *Belckler v. Guenther*, 121 Iowa, 419, 96 N. W. 895.

<sup>269</sup> *Hawes v. Burlington, C. R. & N. R. Co.*, 64 Iowa, 315, 20 N. W. 717.

<sup>270</sup> *Holmes v. Blogg*, 8 Taunt. 508; *Valentini v. Canali*, 24 Q. B. Div. 166; *Riley v. Mallory*, 33 Conn. 201; *Utermehle v. McGreal*, 1 App. D. C. 359; *Strain v. Wright*, 7 Ga. 568; *Curry v. St. John Plow Co.*, 55 Ill. App. 82; *Carpenter v. Carpenter*, 45 Ind. 142; *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Bryant v. Pottinger*, 6 Bush (Ky.) 473; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Reynolds v. Garber-Bulck Co.*, 183 Mich. 157, 149 N. W. 985, L. R. A. 1915C, 362; *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216; *Ferguson v. Bobo*, 54 Miss. 121; *Kerr v. Bell*, 44 Mo. 120; *Highley v. Barron*, 49 Mo. 103; *Koerner v. Wilkinson*, 96 Mo. App. 510, 70 S. W. 509; *Berry v. Stigall*, 253 Mo. 690, 162 S. W. 126, 50 L. R. A. (N. S.) 489, Ann. Cas. 1915C, 118; *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 N. W. 428; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Stack v. Cavanaugh*, 67 N. H. 149, 30 Atl. 350; *Locke v. Smith*, 41 N. H. 346; *Roof v. Stafford*, 7 Cow. (N. Y.) 179; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Tipton v. Tipton's Ex'rs*, 48 N. C. 552; *Lane v. Dayton Coal & Iron*

of the American decisions have materially modified the English rule, or rejected it altogether. They hold that, on the disaffirmance of a contract, an infant is not bound to place the other party in statu quo; that he may rescind or repudiate his engagements without refunding or restoring what he may have received under them, at least if it is not shown that he still retains in his possession or control the consideration given to him; and that if the benefits which he received under the contract were intangible and so incapable of physical restitution (as, for instance, under a contract insuring his life or for imparting to him education in the higher branches of learning), this is no obstacle to his repudiating the contract on a plea of infancy and recovering back whatever he may have paid or given under it.<sup>271</sup> And in some cases it is held that the obligation of a minor to make restitution upon disaffirming a contract exists only in cases where he has received money or property by reason of the contract which he seeks to avoid, and that he is not required to make restitution of something which it is impossible to restore.<sup>272</sup>

Still other decisions make a distinction between cases in which the contract is executory and the adult party to it seeks its enforcement, and those in which the contract is executed and the infant applies to the courts for relief from it. Thus, it has been said: "A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the in-

Co., 101 Tenn. 581, 48 S. W. 1094; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037.

<sup>271</sup> *St. Louis, I. M. & S. Ry. v. Higgins*, 44 Ark. 293; *McKinney v. McCullar*, 95 Ark. 164, 128 S. W. 1043; *Shipley v. Smith*, 162 Ind. 526, 70 N. E. 803; *Towell v. Pence*, 47 Ind. 304; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Robinson v. Weeks*, 56 Me. 102; *Nielson v. International Text-Book Co.*, 106 Me. 104, 75 Atl. 330, 20 Ann. Cas. 591; *Simpson v. Prudential Ins. Co.*, 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560; *White v. New Bedford Cotton Waste Corp.*, 178 Mass. 20, 59 N. E. 642; *Smith v. Equitable Co-operative Bank*, 219 Mass. 382, 106 N. E. 1020; *Corey v. Burton*, 32 Mich. 30; *Downing v. Stone*, 47 Mo. App. 144; *Craighead v. Wells*, 21 Mo. 404; *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.

<sup>272</sup> *Pennsylvania Co. v. Purvis*, 128 Ill. App. 367.

fant, on becoming of age, disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor to have the contract performed. In such cases, the infant or quondam infant is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is that if he retained and held all or any part of what he had received under the contract, until he reached the age of twenty-one, then on demand or suit he can be held to account for it. The rule is different where the contract has been executed. Then the quondam infant, or any one asserting a claim in his right, must become the actor, and coming into court in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed him. This is the difference between asking and resisting relief. \* \* \* But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still in esse and in the possession of the party seeking relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during his minority.”<sup>278</sup>

There are also decisions which make the question of restitution by an infant depend chiefly on the character of the contract with reference to its benefiting his interests, that is, on the question whether it was fair, reasonable, and beneficial to him, on the one hand, or whether, on the other hand, it was marked by fraud, imposition, or overreaching. In an important and well-reasoned decision by the Supreme Court of Minnesota, it was said: “Our conclusion is that

<sup>278</sup> *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314. And see *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255; *Pemberton B. & L. Ass'n v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043.

where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on the part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.”<sup>274</sup> Such was also the decision in a case

<sup>274</sup> *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473. In the course of the opinion in this case it was said: “Many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the English rule seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more

in New York, in which it was held that an infant was not entitled to recover back the sum paid under a chattel mortgage given to secure payment of the price of a piano which he had purchased, where it appeared that the reasonable

than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between an adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to all the relations where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment, as, for example, parent and child, husband and wife, or guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no fiduciary relation between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction. If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid,

value of the use of the piano during the time he had retained and used it exceeded the amount which he had paid.<sup>275</sup>

From this confusion of the authorities it seems possible, however, to extract at least one rule on which all are in substantial agreement. It is that if the consideration received by the infant consisted in money or property, and if he still retains it in his possession or control at the time he seeks to disaffirm his contract, or if he retains possession of other property into which he had converted it, then he must restore it to the other party as a condition to being released from his own engagement or recovering his own money or property.<sup>276</sup> "Equity will restore his or her property to the disaffirming party, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand or the property into which it has been converted can be reached by a proceeding in rem."<sup>277</sup>

without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering of the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251, really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice."

<sup>275</sup> *Wanisch v. Wuertz*, 79 Misc. Rep. 610, 140 N. Y. Supp. 573.

<sup>276</sup> *In re Huntenberg* (D. C.) 153 Fed. 768; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Myrick v. Jacks*, 39 Ark. 293; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Sanger v. Hibbard*, 2 Ind. T. 547, 53 S. W. 330; *Betts v. Carroll*, 6 Mo. App. 518; *Zuck v. Turner Harness & Carriage Co.*, 106 Mo. App. 566, 80 S. W. 967; *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363; *Bedinger v. Wharton*, 27 Grat. (Va.) 857; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Gannon v. Manning*, 42 App. D. C. 206.

<sup>277</sup> *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496. And see *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.



But as to the restoration of specific property in a damaged or deteriorated condition, the authorities are again out of agreement. Some cases hold that on the disaffirmance of a contract by which an infant and an adult have exchanged property, the adult is entitled to have back the property which he gave to the infant, if it is of any value, but he must take his property in whatever condition it may be, and if it has been injured or impaired by the infant while in his possession, there is no remedy, unless perhaps in an action of tort, as where the infant got the property by falsely representing himself to be of full age.<sup>278</sup> But other cases maintain that the infant should not be permitted to rescind his contract at all unless he is able to return the property in substantially as good condition as when he received it,<sup>279</sup> or else that he must compensate the adult for injuries to the property sustained while it was in his possession.<sup>280</sup> But where an infant seeks to rescind a settlement made by his guardian for less than the amount due on his judgment against a corporation, on the ground of fraud and want of consideration, he is not obliged to tender the amount paid, in order to recover the balance due, since he would be entitled to that much in any event.<sup>281</sup> It should also be observed that a firm cannot maintain an action on a policy of fire insurance, without first offering to restore what has been received under a settlement for the loss, although the same was effected by a partner who was a minor and through the fraud of an agent of the company.<sup>282</sup>

§ 311. **Same; Property Lost, Sold, or Dissipated.**—The authorities generally agree that it is not a condition of the disaffirmance by an infant of a contract made during his infancy that he shall return the consideration received by

<sup>278</sup> *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210.

<sup>279</sup> *Riley v. Mallory*, 33 Conn. 201; *Bartholomew v. Flinnemore*, 17 Barb. (N. Y.) 428.

<sup>280</sup> *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006.

<sup>281</sup> *Winter v. Kansas City Cable Ry. Co.*, 160 Mo. 159, 61 S. W. 606.

<sup>282</sup> *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479.

him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, so that it cannot be restored, or if the money paid to him under the contract has been dissipated or spent.<sup>283</sup> As stated in one of the cases, where an infant has lost or squandered the consideration of a contract during his minority, and desires on coming of age to set the contract aside, he cannot be required to purchase the right of reclaiming his own by abstractions from his estate.<sup>284</sup> More especially is this rule applicable where the money received under the contract has been expended in the purchase of necessities, and the minor has no estate whatever when he seeks to avoid the contract.<sup>285</sup> In pursuance of the rule, it is held that a minor may repudiate a note given by him for borrowed money without returning the amount of the loan, unless it appears that the money loaned is still in his possession.<sup>286</sup>

§ 312. **Effect of Avoidance.**—When a voidable contract of an infant is disaffirmed by him, it is rendered void ab initio by relation, and the parties are thereby returned to

<sup>283</sup> *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Bell v. Burkhalter*, 176 Ala. 62, 57 South. 460; *Reynolds v. McCurry*, 100 Ill. 356; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Dill v. Bowen*, 54 Ind. 204; *First Nat. Bank v. Casey*, 158 Iowa, 349, 138 N. W. 897; *Burgett v. Barrick*, 25 Kan. 526; *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762; *Thing v. Libbey*, 16 Me. 55; *Monumental Building Ass'n v. Herman*, 33 Md. 128; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Brantley v. Wolf*, 60 Miss. 420; *Lake v. Perry*, 95 Miss. 550, 49 South. 569; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Dickerson v. Gordon*, 52 Hun, 614, 5 N. Y. Supp. 310; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Bedinger v. Wharton*, 27 Grat. (Va.) 857; *Young v. West Virginia, C. & P. Ry. Co.*, 42 W. Va. 112, 24 S. E. 615.

<sup>284</sup> *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788.

<sup>285</sup> *Featherstone v. Betlejewski*, 75 Ill. App. 59.

<sup>286</sup> *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

note.<sup>802</sup> So where, in an action against an infant for the price of goods sold, the proceeds of the property purchased have been attached in the hands of a third person, the plea of infancy annuls the contract, defeats collection of the debt, dissolves the attachment, and releases the funds.<sup>803</sup> But an infant may avoid personal liability by disaffirming a contract made by a firm of which he was a member, without disaffirming the contract of partnership.<sup>804</sup>

<sup>802</sup> *Hyde v. Courtwright*, 14 Ind. App. 106, 42 N. E. 647.

<sup>803</sup> *Wallace v. Leroy*, 57 W. Va. 263, 50 S. E. 243, 110 Am. St. Rep. 777.

<sup>804</sup> *Mehlhop v. Rae*, 90 Iowa, 30, 57 N. W. 650.

## CHAPTER XIII

## ILLEGALITY AND IMMORALITY

- § 313. General Rule as to Executed Contracts.
- 314. Rescission of Executory Contracts.
- 315. Immoral Contracts.
- 316. Gambling, Wagering Contracts, and Lotteries.
- 317. Contracts Affected by Champerty and Maintenance.
- 318. Contracts Violative of Statutes.
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- 322. Contracts Contrary to Public Policy.
- 323. Fraudulent Transfers and Schemes to Defraud.
- 324. Contracts Violating Sunday Laws.
- 325. Usurious Contracts.

§ 313. General Rule as to Executed Contracts.—When a contract which is illegal or contrary to good morals or public policy has been executed, neither of the parties to it can obtain the aid of the courts to rescind it or set it aside. Both of them being participants in a transaction which the law condemns, the law will not assist either of them to undo the transaction, but will leave them just where their own acts have placed them.<sup>1</sup> “The maxim, ‘*ex turpi causa non oritur actio*,’ is an old and familiar one, resting on the clearest principles of public policy and never to be ignored. In accordance with this maxim, nothing is better settled than that, in regard to contracts which are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them whilst they remain executory, either

<sup>1</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *Cincinnati, H. & D. R. Co. v. McKeen*, 64 Fed. 36, 12 C. C. A. 14; *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260; *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S. E. 967; *Cisna v. Sheibley*, 88 Ill. App. 385; *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Monatt v. Parker*, 30 La. Ann. 585, 31 Am. Rep. 229; *Murray v. White*, 42 Mont. 423, 113 Pac. 754, Ann. Cas. 1912A, 1297; *Costello v. Portsmouth Brewing Co.*, 69 N. H. 405, 43 Atl. 640; *Roche v. Hoyt*, 72 N. J. Eq. 947, 73 Atl. 1118; *Gisaf v. Neval*, 81 Pa. 354; *Jones v. Williams*, 41 Tex. 390; *Bishop v. Japhet* (Tex. Civ. App.) 171 S. W. 499; *Sicklesteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024. Compare *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117.

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<sup>1</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *Cincinnati, H. & D. R. Co. v. McKeen*, 64 Fed. 36, 12 C. C. A. 14; *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260; *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S. E. 967; *Cisna v. Shelbley*, 88 Ill. App. 385; *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Monatt v. Parker*, 30 La. Ann. 585, 31 Am. Rep. 229; *Murray v. White*, 42 Mont. 423, 113 Pac. 754, Ann. Cas. 1912A, 1297; *Costello v. Portsmouth Brewing Co.*, 69 N. H. 405, 43 Atl. 640; *Roche v. Hoyt*, 72 N. J. Eq. 947, 73 Atl. 1118; *Gisaf v. Neval*, 81 Pa. 354; *Jones v. Williams*, 41 Tex. 390; *Bishop v. Japhet* (Tex. Civ. App.) 171 S. W. 499; *Sicklesteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024. Compare *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117.

in whole or in part, nor, when executed, will it aid either party to place himself in statu quo by a rescission, but will in both cases leave the parties where it finds them.”<sup>2</sup> It may be said, however, that the maxim quoted more properly states the reason why the courts will not give their assistance for the enforcement of an illegal contract which remains executory, while the ground for refusing to overhaul or set aside such a contract after it has been executed is expressed in the maxim, “in pari delicto potior est conditio defendentis.”<sup>3</sup> Thus, it is said: “When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract.”<sup>4</sup>

But because a contract is tainted with illegality it does not follow that both parties must be considered as equally implicated nor that the policy of the law requires that relief should be denied to the one who is wholly or comparatively innocent. “If the contract is illegal,” says the Supreme Court of the United States, “affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant.”<sup>5</sup> This distinction is also recognized in the codes of some of the states, judicial rescission of a written contract being allowed “where the contract is unlawful for causes not apparent upon its face and the parties were not equally in fault.”<sup>6</sup> For instance,

<sup>2</sup> *Hooker v. De Palos*, 28 Ohio St. 251.

<sup>3</sup> *Gotwalt v. Neal*, 25 Md. 434.

<sup>4</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748.

<sup>5</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748. And see *Wilson v. Calhoun* (Iowa) 151 N. W. 1087.

<sup>6</sup> Civ. Code Cal., § 3406; Rev. Civ. Code Mont., § 6112; Rev. Civ. Code N. Dak., § 6623; Rev. Civ. Code S. Dak., § 2353.



a contract between a vendor and vendee of real estate is not affected by any secret intention of the vendee to use the premises for an unlawful purpose.<sup>7</sup> So, a plaintiff who has been induced to enter into a contract by the false representations of the defendant that it is such as the courts have held to be legal and not contrary to the postal laws and regulations, and who has received nothing under the contract, and abandons it as soon as he discovers its illegality, is not in *pari delicto* with the defendant, but is entitled to rescission.<sup>8</sup>

But even where the parties are in *pari delicto*, relief may in some exceptional cases be granted to one of them as against the other, and chiefly in cases where the undoing of the contract would promote the public interest, or where to withhold relief would to a greater extent offend the public morals or facilitate the perpetration of frauds.<sup>9</sup> Thus in a case in Missouri, where the plaintiff entered into a dishonest scheme with a band of gamblers to obtain money, and was caught and entrapped by them in their scheme, which was so fraudulently conducted as to make it certain that the plaintiff would lose, it was said that the court would not listen to his prayer for relief if there was nothing in the case to make their offense more heinous than his, and if to grant him relief would amount to nothing more than to restore to him the money he had lost. But if there had been other like transactions engaged in by the defendants, the court would permit the plaintiff to recover the money of which he was defrauded, in order to aid in breaking up such dishonest pursuits, for in such cases the court interferes from motives of public policy.<sup>10</sup> Also, it is held that if a contract was induced by fraud or duress, or obtained from a person so intoxicated at the time as to be unaware of what he was doing, or, generally, if any recognized and sufficient ground for its rescission exists, rescission will not be prevented by the fact that the

<sup>7</sup> *Nortnass v. Pioneer Townsite Co.*, 82 Neb. 382, 117 N. W. 951.

<sup>8</sup> *Coons v. Lain* (Tex. Civ. App.) 168 S. W. 981.

<sup>9</sup> *Gilchrist v. Hatch* (Ind.) 106 N. E. 694.

<sup>10</sup> *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709.

contract was also illegal, as, for instance, because it was made on a Sunday.<sup>11</sup> And if the parties mutually agree to rescind a contract which they discover to have been forbidden by a statute, having made it in good faith, it seems that the one who has made payments under the contract may maintain an action to recover them back.<sup>12</sup>

The same principles have sometimes been thought applicable to the case where an illegal contract has been partially performed, but not completely. "Where such a contract has been partially executed by both parties, as where one has paid money on the contract and the other has rendered services, or delivered property, or otherwise suffered loss or damage by part performance on his part, then we understand the law to be that, as to such part performance, the condition of the parties is the same as if the contract had been fully executed. The law will aid neither party in its farther execution, nor in undoing what has been done under it. Neither of the parties has a right to be placed in statu quo at the expense of the other."<sup>13</sup>

If a contract is only in part illegal—that is, if it embraces several distinct things, some of which are illegal and others not—its voidability as a whole will depend upon whether the consideration given was entire and went to the whole contract or is apportionable, so that it may be distributed between the legal and illegal objects. In the former case, there can be no rescission or recovery as to any

<sup>11</sup> *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151.

<sup>12</sup> *Skinner v. Henderson*, 10 Mo. 205.

<sup>13</sup> *Hooker v. De Palos*, 28 Ohio St. 251. In this case it was said: "Suppose A. should contract with a builder for the erection of a building to be used for unlawful purposes. If the builder, in furtherance of the unlawful purpose, performs the contract on his part, it is clear that the law will not aid him in recovering from A. the price agreed to be paid. But suppose the price had been paid in advance, and the builder had procured the necessary materials and had partly constructed the building. Could A. then, by rescinding or abandoning the contract, acquire a right to recover back the money paid? Most clearly not. He was at least in *pari delicto*, and could have no equitable right to throw all the loss arising from the abandonment of the illegal purpose upon the other party. His repentance, to be meritorious, should come in time to prevent loss to the other party, and, if honest, should be at his own proper expense."

part of the transaction, but in the latter case, those portions of the contract which the law does not condemn may be separated out and saved.<sup>14</sup>

**§ 314. Rescission of Executory Contracts.**—It is a general rule, as above stated, that where an illegal contract remains executory, neither party can maintain an action to enforce it.<sup>15</sup> It follows from this that either of the parties must be in a position to rescind or repudiate the contract at his pleasure, and that the other can take no steps in court to compel him to perform, nor recover damages for his refusal to perform. But the courts go much further than this, and hold that if the object of the contract, though prohibited by law, was not *malum in se* nor criminal, either party, while the contract remains executory, may rescind it and recover back any money advanced by him under the contract to the other party.<sup>16</sup> This is the voice of all the authorities. "In all cases of contracts prohibited by statutes, or which are void as against public policy, the law allows a day for repentance while the contract remains executory. He who advances money in consideration of a promise or undertaking to do such a thing may, at any time before it is done, rescind the contract and prevent the thing from being done, and recover back the money."<sup>17</sup> "The rule in respect to money paid on an illegal contract appears in general to be that money advanced may be recovered back whilst the contract remains executory, because a violation of law is thereby prevented. When both parties are in *pari delicto*, *melior est conditio defendentis*,

<sup>14</sup> *Ripperdan v. Weldy*, 149 Cal. 667, 87 Pac. 276; *Horseman v. Horseman*, 43 Or. 83, 72 Pac. 698; *Rayner Cattle Co. v. Bedford*, 91 Tex. 642, 44 S. W. 410, 45 S. W. 554; *Green v. Price*, 13 Mees. & W. 695.

<sup>15</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; *McAndrew v. Taylor*, 15 Ga. App. 555, 83 S. E. 967.

<sup>16</sup> *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Pepper v. Haight*, 20 Barb. (N. Y.) 429; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Hooker v. De Palos*, 28 Ohio St. 251; *Miller v. Larson*, 19 Wls. 463. See *Mansfield v. Bank of Monett*, 74 Mo. App. 200.

<sup>17</sup> *Harper v. Crain*, 36 Ohio St. 338, 38 Am. Rep. 589. And see *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 147, 16 Am. Dec. 556; *Hooker v. De Palos*, 28 Ohio St. 251.

not because he is favored in law, but because the plaintiff must draw his justice from pure sources."<sup>18</sup> "So long as the illegal acts contemplated by such contracts remain wholly unexecuted, the party who has paid money to obtain their performance may repent of the wrongful purpose, abandon his contract, and recover back the money so paid. The law will aid him in such a case, in furtherance of a policy which aims to prevent wrongdoing by encouraging such repentance and abandonment."<sup>19</sup> "If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."<sup>20</sup> It is also to be remarked that a rescission or repudiation of an illegal contract may be effected by the subsequent making of another contract, inconsistent with it, which is carried into execution.<sup>21</sup>

**§ 315. Immoral Contracts.**—Where one has made a donation, conveyance, or other transfer of property or money, upon a consideration which is contrary to good morals (such as past illicit sexual intercourse), he cannot obtain the aid of a court to cancel his deed or recover his money or property; the transaction being executed and the consideration vicious, the courts will leave it where it stands.<sup>22</sup> And if an immoral contract remains executory, neither of the parties to it will be assisted by the courts in securing

<sup>18</sup> *Skinner v. Henderson*, 10 Mo. 207.

<sup>19</sup> *Hooker v. De Palos*, 28 Ohio St. 251.

<sup>20</sup> *Taylor v. Bowers*, 1 Q. B. Div. 291.

<sup>21</sup> *Lafferty v. Jelley*, 22 Ind. 471.

<sup>22</sup> *Glsaf v. Neval*, 81 Pa. 354; *Marksbury v. Taylor*, 10 Bush (Ky.) 519; *Monatt v. Parker*, 30 La. Ann. 585, 31 Am. Rep. 229. In South Carolina, it was held that the right of the wife and legitimate children of a donor to elect to avoid a gift to the donor's concubine or illegitimate children, if it exceeded more than one-fourth of his whole estate, contrary to the Act of Dec. 19, 1795, § 4 (5 St. at Large, p. 271) was personal and could not be exercised by the donor's next of kin. *Ford v. McElray*, 1 Rich. Eq. (S. C.) 474; *Brelthaupt v. Bauskett*, 1 Rich. Eq. (S. C.) 465. But see *Lanhardt v. Souder*, 42 App. D. C. 278, holding that a deed made by a father for the benefit of his illegitimate children is based upon a good and supporting consideration.

its enforcement or the assertion of any rights or claims under it.<sup>23</sup> Thus, a lease of premises to be used as a house of prostitution, executed by the lessor with knowledge of the lessee's purpose, is illegal and neither party can demand relief from it or under it.<sup>24</sup> The lessee cannot obtain possession by aid of the law, and the lessor cannot recover the rent.<sup>25</sup> And a lease of property for use as a bawdy-house is none the less illegal because drawn in the form of a contract of sale to avoid the consequences of making a lease.<sup>26</sup> And a seller who, on conveying property to a prostitute, knowing that she intends to put it to an immoral use, reserves the title and the right to take possession whenever he may deem himself insecure, even before the maturity of the deferred payments, so aids and participates in such immoral use as to make the sale void.<sup>27</sup> But so long as a contract founded upon an immoral consideration remains wholly executory on either side, the party who has not performed may rescind the contract, that is, he may repudiate it and withdraw from it, leaving the other party no redress for his refusal to perform.<sup>28</sup> Thus, a promise of future illicit cohabitation is a vicious consideration, and if one has agreed to convey property upon such a consideration, he may, before execution, repudiate his undertaking, and thereupon it cannot be enforced.<sup>29</sup> The rule applies equally in the reverse case, that is, an unexecuted promise to transfer property in consideration of past illegal sexual relations may be revoked.<sup>30</sup> It is so also in regard to the lease of premises for an immoral purpose, of which the lessor is not aware at the time. In an English case, the lessor of certain rooms in a building was held justified in rescinding the lease and refusing to allow the lessee the possession or use of the premises, when he discovered that they were

<sup>23</sup> *Barry v. Mulhall*, 162 App. Div. 749, 147 N. Y. Supp. 996.

<sup>24</sup> *Eckles v. Nowlin* (Tex. Civ. App.) 158 S. W. 794.

<sup>25</sup> *McRae v. Cassan*, 15 N. M. 496, 110 Pac. 574.

<sup>26</sup> *Hodson v. Walker*, 170 Mo. App. 632, 157 S. W. 104.

<sup>27</sup> *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960.

<sup>28</sup> *Stillman v. Mitchell*, 25 N. Y. Super. Ct. 523.

<sup>29</sup> *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 32.

<sup>30</sup> *McQuitty v. Wilhite*, 247 Mo. 163, 152 S. W. 598.

to be opened and used for the purpose of certain irreligious lectures, and it was held that no action could be maintained for the breach of his contract.<sup>31</sup> The principle should also protect an innocent lessor who discovers that his tenant intends to use the premises for purposes of prostitution. And in several of the states the statutes are so framed as to permit a landlord, whose tenant is using the demised premises for the unlawful sale of intoxicating liquors, to cancel the lease and recover possession of the property, provided, of course, that he did not know or intend that the premises should be so used.<sup>32</sup>

**§ 316. Gambling, Wagering Contracts, and Lotteries.**

The courts will not aid either of the parties to a gambling or wagering transaction, but will refuse to consider any rights or liabilities which arise out of or are enforceable only as claims under the illegal transaction.<sup>33</sup> Thus, a court of equity will not lend its aid for the settlement or adjustment of the transactions of a partnership formed for gambling purposes, nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution, or reimbursement.<sup>34</sup> But so long as a wagering contract remains executory, either party may rescind it and claim the restoration of his stake. In a case in Ohio, the parties made a bet on a coming election, disguising it under the form of a sale of a horse from plaintiff to defendant, the horse being placed in defendant's possession and he giving his written promise to pay \$140 for it in case a certain candidate should be elected, but otherwise nothing. It was held that the defendant might, at any time before the election took place, rescind the contract by surrendering back the horse in good condition and demanding the return of his obligation.<sup>35</sup> So, where both the parties

<sup>31</sup> *Cowan v. Milbourne*, L. R. 2 Ex. 230.

<sup>32</sup> *McGarvey v. Puckett*, 27 Ohio St. 669; *Justice v. Lowe*, 26 Ohio St. 372; *Mitchell v. Scott*, 62 N. H. 596.

<sup>33</sup> *Thompson v. Willmanson*, 67 N. J. Eq. 212, 58 Atl. 602; *Sunderland v. Hibbard*, 97 Neb. 21, 149 N. W. 57; *Davis v. Fleshman*, 245 Pa. 224, 91 Atl. 489. See *Price v. Browning*, 4 Grat. (Va.) 68.

<sup>34</sup> *Watson v. Fletcher*, 7 Grat. (Va.) 1.

<sup>35</sup> *Harper v. Crain*, 36 Ohio St. 338, 38 Am. Rep. 589.

to a bet or wager have deposited the money bet in the hands of a third person, to await the event which is to determine the wager, either party has the right to rescind and to reclaim his money out of the hands of the stakeholder, on giving the latter notice of his intention so to do, and this (according to most of the authorities) even after the occurrence of the event determining the bet, provided the money has not actually been paid over to the winning party.<sup>36</sup> But it would appear that the policy of the law in regard to allowing a recovery from the stakeholder after the determination of the event, in the absence of a statute, is not entirely clear. It has been remarked by the court in California, in a remarkably energetic opinion, that "if the parties to an illegal wager repent and desire to withdraw before the wager has been decided, let them be encouraged to do so by allowing them to recover their stakes from each other, or from the stakeholder if one has been employed. No obstacle should be thrown in the way of their repentance, and if they retract before the bet has been decided, their money ought to be returned to them. But persons who allow their stakes to remain until after the bet has been decided, and the result has become generally known, are entitled to no such consideration. Their tears, if any, are not repentant tears, but such as crocodiles shed over the victims they are about to devour. To allow them to recover is not to reward repentance, nor to promote the public good; for as to that, the mischief has already been done; but to reward hypocrisy and promote the private interests of such as are found willing to violate not only the

<sup>36</sup> *Shackleford v. Ward*, 3 Ala. 37, 36 Am. Dec. 435; *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Wheeler v. Spencer*, 15 Conn. 28; *Alford v. Burke*, 21 Ga. 46, 68 Am. Dec. 449; *McLennan v. Whiddon*, 120 Ga. 666, 48 S. E. 201; *Taylor v. Moore*, 20 Ind. App. 654, 50 N. E. 770; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275; *White v. Gilleland*, 93 Mo. App. 310; *Hickerson v. Benson*, 8 Mo. 8, 40 Am. Dec. 115; *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *Dunn v. Drummond*, 4 Okl. 461, 51 Pac. 656; *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857; *Davis v. Fleshman*, 245 Pa. 224, 91 Atl. 489; *Lillard v. Mitchell* (Tenn. Ch. App.) 37 S. W. 702; *Tarleton v. Baker*, 18 Vt. 9, 44 Am. Dec. 358. And see *Hilton v. Bailey* (Okl.) 149 Pac. 863.



fant, on becoming of age, disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor to have the contract performed. In such cases, the infant or quondam infant is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is that if he retained and held all or any part of what he had received under the contract, until he reached the age of twenty-one, then on demand or suit he can be held to account for it. The rule is different where the contract has been executed. Then the quondam infant, or any one asserting a claim in his right, must become the actor, and coming into court in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed him. This is the difference between asking and resisting relief. \* \* \* But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still in esse and in the possession of the party seeking relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during his minority.”<sup>278</sup>

There are also decisions which make the question of restitution by an infant depend chiefly on the character of the contract with reference to its benefiting his interests, that is, on the question whether it was fair, reasonable, and beneficial to him, on the one hand, or whether, on the other hand, it was marked by fraud, imposition, or overreaching. In an important and well-reasoned decision by the Supreme Court of Minnesota, it was said: “Our conclusion is that

<sup>278</sup> *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314. And see *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 Atl. 255; *Pemberton B. & L. Ass'n v. Adams*, 53 N. J. Eq. 258, 31 Atl. 280; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428; *Jones v. Valentines' School of Telegraphy*, 122 Wis. 318, 99 N. W. 1043.

where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on the part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law."<sup>274</sup> Such was also the decision in a case

<sup>274</sup> *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473. In the course of the opinion in this case it was said: "Many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. The dissatisfaction with what we have termed the English rule seems to be generally based upon the idea that the courts would not grant an infant relief, on the ground of fraud or undue influence, except where they would grant it to an adult on the same grounds, and then only on the same conditions. Many of the cases, we admit, would seem to support this idea. If such were the law, it is obvious that there would be many cases where it would furnish no adequate protection to the infant. Cases may be readily imagined where an infant may have paid for an article several times more

in New York, in which it was held that an infant was not entitled to recover back the sum paid under a chattel mortgage given to secure payment of the price of a piano which he had purchased, where it appeared that the reasonable

than it was worth, or where the contract was of an improvident character, calculated to result in the squandering of his estate, and that fact was known to the other party; and yet if he was an adult the court would grant him no relief, but leave him to stand the consequences of his own foolish bargain. But to measure the right of an infant in such cases by the same rule that would be applied in the case of an adult would be to fail to give due weight to the disparity between an adult and the infant, or to apply the proper standard of fair dealing due from the former to the latter. Even as between adults, when a transaction is assailed on the ground of fraud, undue influence, etc., their disparity in intelligence and experience, or in any other respect which gives one an ascendancy over the other, or tends to prevent the latter from exercising an intelligent and unbiased judgment, is always a most vital consideration with the courts. Where a contract is improvident and unfair, courts of equity have frequently inferred fraud from the mere disparity of the parties. If this is true as to adults, the rule ought certainly to be applied with still greater liberality in favor of infants, whom the law deems so incompetent to care for themselves that it holds them incapable of binding themselves by contract, except for necessities. In view of this disparity of the parties, thus recognized by law, every one who assumes to contract with an infant should be held to the utmost good faith and fair dealing. We further think that this disparity is such as to raise a presumption against the fairness of the contract, and to cast upon the other party the burden of proving that it was a fair and reasonable one, and free from any fraud, undue influence, or overreaching. A similar principle applies to all the relations where, from disparity of years, intellect, or knowledge, one of the parties to the contract has an ascendancy which prevents the other from exercising an unbiased judgment, as, for example, parent and child, husband and wife, or guardian and ward. It is true that the mere fact that a person is dealing with an infant creates no fiduciary relation between them, in the proper sense of the term, such as exists between guardian and ward; but we think that he who deals with an infant should be held to substantially the same standard of fair dealing, and be charged with the burden of proving that the contract was in all respects fair and reasonable, and not tainted with any fraud, undue influence, or overreaching on his part. Of course, in this as in all other cases, the degree of disparity between the parties, in age and mental capacity, would be an important consideration. Moreover, if the contract was not in all respects fair and reasonable, the extent to which the infant should recover would depend on the nature and extent of the element of unfairness which characterized the transaction. If the party dealing with the infant was guilty of actual fraud or bad faith, we think the infant should be allowed to recover back all he had paid,

value of the use of the piano during the time he had retained and used it exceeded the amount which he had paid.<sup>275</sup>

From this confusion of the authorities it seems possible, however, to extract at least one rule on which all are in substantial agreement. It is that if the consideration received by the infant consisted in money or property, and if he still retains it in his possession or control at the time he seeks to disaffirm his contract, or if he retains possession of other property into which he had converted it, then he must restore it to the other party as a condition to being released from his own engagement or recovering his own money or property.<sup>276</sup> "Equity will restore his or her property to the disaffirming party, but the person who thus loses it will be permitted to recover any money paid upon the faith of the validity of the transaction, provided the money is then in hand or the property into which it has been converted can be reached by a proceeding in rem."<sup>277</sup>

without making restitution, except, of course, to the extent to which he still retained in specie what he had received. Such a case would be a contract essentially improvident, calculated to facilitate the squandering of the infant's estate, and which the other party knew or ought to have known to be such, for to make such a contract at all with an infant would be fraud. But if the contract was free from any fraud or bad faith, and otherwise reasonable, except that the price paid by the infant was in excess of the value of what he received, his recovery should be limited to the difference between what he paid and what he received. Such cases as *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Sparman v. Keim*, 83 N. Y. 245; and *Heath v. Stevens*, 48 N. H. 251, really proceed upon this principle, although they may not distinctly announce it. The objections to this rule are, in our opinion, largely imaginary, for we are confident that in practice it can and will be applied by courts and juries so as to work out substantial justice."

<sup>275</sup> *Wanisch v. Wuertz*, 79 Misc. Rep. 610, 140 N. Y. Supp. 573.

<sup>276</sup> *In re Huntenberg* (D. C.) 153 Fed. 768; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Myrick v. Jacks*, 39 Ark. 293; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Sanger v. Hibbard*, 2 Ind. T. 547, 53 S. W. 330; *Betts v. Carroll*, 6 Mo. App. 518; *Zuck v. Turner Harness & Carriage Co.*, 106 Mo. App. 566, 80 S. W. 967; *Star v. Watkins*, 78 Neb. 610, 111 N. W. 363; *Bedinger v. Wharton*, 27 Grat. (Va.) 857; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Gannon v. Manning*, 42 App. D. C. 206.

<sup>277</sup> *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496. And see *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12.

But as to the restoration of specific property in a damaged or deteriorated condition, the authorities are again out of agreement. Some cases hold that on the disaffirmance of a contract by which an infant and an adult have exchanged property, the adult is entitled to have back the property which he gave to the infant, if it is of any value, but he must take his property in whatever condition it may be, and if it has been injured or impaired by the infant while in his possession, there is no remedy, unless perhaps in an action of tort, as where the infant got the property by falsely representing himself to be of full age.<sup>278</sup> But other cases maintain that the infant should not be permitted to rescind his contract at all unless he is able to return the property in substantially as good condition as when he received it,<sup>279</sup> or else that he must compensate the adult for injuries to the property sustained while it was in his possession.<sup>280</sup> But where an infant seeks to rescind a settlement made by his guardian for less than the amount due on his judgment against a corporation, on the ground of fraud and want of consideration, he is not obliged to tender the amount paid, in order to recover the balance due, since he would be entitled to that much in any event.<sup>281</sup> It should also be observed that a firm cannot maintain an action on a policy of fire insurance, without first offering to restore what has been received under a settlement for the loss, although the same was effected by a partner who was a minor and through the fraud of an agent of the company.<sup>282</sup>

§ 311. **Same; Property Lost, Sold, or Dissipated.**—The authorities generally agree that it is not a condition of the disaffirmance by an infant of a contract made during his infancy that he shall return the consideration received by

<sup>278</sup> *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210.

<sup>279</sup> *Riley v. Mallory*, 33 Conn. 201; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428.

<sup>280</sup> *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006.

<sup>281</sup> *Winter v. Kansas City Cable Ry. Co.*, 160 Mo. 159, 61 S. W. 606.

<sup>282</sup> *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479.

him if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed, so that it cannot be restored, or if the money paid to him under the contract has been dissipated or spent.<sup>283</sup> As stated in one of the cases, where an infant has lost or squandered the consideration of a contract during his minority, and desires on coming of age to set the contract aside, he cannot be required to purchase the right of reclaiming his own by abstractions from his estate.<sup>284</sup> More especially is this rule applicable where the money received under the contract has been expended in the purchase of necessities, and the minor has no estate whatever when he seeks to avoid the contract.<sup>285</sup> In pursuance of the rule, it is held that a minor may repudiate a note given by him for borrowed money without returning the amount of the loan, unless it appears that the money loaned is still in his possession.<sup>286</sup>

§ 312. **Effect of Avoidance.**—When a voidable contract of an infant is disaffirmed by him, it is rendered void ab initio by relation, and the parties are thereby returned to

<sup>283</sup> *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Bell v. Burkhalter*, 176 Ala. 62, 57 South. 460; *Reynolds v. McCurry*, 100 Ill. 356; *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 89 N. E. 796, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522; *Dill v. Bowen*, 54 Ind. 204; *First Nat. Bank v. Casey*, 158 Iowa, 349, 138 N. W. 897; *Burgett v. Barrick*, 25 Kan. 526; *Gray v. Grimm*, 157 Ky. 603, 163 S. W. 762; *Thing v. Libbey*, 16 Me. 55; *Monumental Building Ass'n v. Herman*, 33 Md. 128; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479; *Barr v. Packard Motor Car Co.*, 172 Mich. 299, 137 N. W. 697; *Braucht v. Graves-May Co.*, 92 Minn. 116, 99 N. W. 417; *Brantley v. Wolf*, 60 Miss. 420; *Lake v. Perry*, 95 Miss. 550, 49 South. 569; *Tower-Doyle Commission Co. v. Smith*, 86 Mo. App. 490; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Dickerson v. Gordon*, 52 Hun, 614, 5 N. Y. Supp. 310; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640; *Abernathy v. Phillips*, 82 Va. 769, 1 S. E. 113; *Bedinger v. Wharton*, 27 Grat. (Va.) 857; *Young v. West Virginia, C. & P. Ry. Co.*, 42 W. Va. 112, 24 S. E. 615.

<sup>284</sup> *Southern Cotton Oil Co. v. Dukes*, 121 Ga. 787, 49 S. E. 788.

<sup>285</sup> *Featherstone v. Betlejewski*, 75 Ill. App. 59.

<sup>286</sup> *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407.

recover back money paid to him for services under the contract.<sup>59</sup> But on the other hand, the principle that relief will not be given against an illegal contract should not prevent the rescission in equity of a lease for a purpose prohibited by a municipal ordinance, where the lessee relied on the lessor's superior knowledge of the law, the lessor being attorney for the lessee.<sup>60</sup> So, where a statute makes it a misdemeanor for the owner of lands to survey a plat and sell the same in violation of the terms of the act, the fact that he does not obey the directions of the act does not affect the title of an innocent purchaser.<sup>61</sup> On the same principle, the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into his own country, is not illegal and the contract may be enforced; but otherwise if the foreign seller takes any actual part in the illegal adventure, as by packing the goods in prohibited parcels or otherwise.<sup>62</sup> And again, the illegality of one severable part of an executed contract will not taint the remainder. Thus, one who executed a contract for the installation of plumbing, based on estimates which covered both labor and materials, may recover for the materials furnished, though he is prevented from recovering for his work done by the fact that he was not licensed as a plumber.<sup>63</sup> But if a contract forbidden by statute remains executory, it may be rescinded or repudiated by either of the parties, with the aid of a court of equity, provided he will do equity by restoring what he may have received under it,<sup>64</sup> and provided there is not an adequate remedy for him at law.<sup>65</sup>

These principles have been held applicable to transactions which are voidable for disregard of the statute of

<sup>59</sup> *School District No. 46 v. Johnson*, 26 Colo. App. 433, 143 Pac. 264.

<sup>60</sup> *Altgelt v. Gerbic* (Tex. Civ. App.) 149 S. W. 233.

<sup>61</sup> *Thomas v. Cowin*, 147 Ala. 478, 39 South. 898; *Kern v. Feller*, 70 Or. 140, 140 Pac. 735.

<sup>62</sup> *Pellecat v. Angell*, 2 C. M. & R. 311.

<sup>63</sup> *Barriere v. Depatie*, 219 Mass. 33, 106 N. E. 572.

<sup>64</sup> *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Deans v. Robertson*, 64 Miss. 195, 1 South. 159.

<sup>65</sup> *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65.



frauds.<sup>66</sup> And on this ground a mortgage may be canceled where it appears that the mortgagee is a foreign corporation which has failed to comply with the statute prescribing the conditions on which it may obtain the right to do business within the state, the mortgagor being required, however, to do equity by returning the amount advanced to him under the mortgage with lawful interest.<sup>67</sup> And one who receives securities issued by a foreign corporation in violation of the laws of the state, and then sells them for money, may, it seems, maintain a suit in equity to annul the securities given by him in exchange, but only on condition of his returning those received by him or the money realized on their sale.<sup>68</sup>

A lease may be rescinded at the instance of the lessee, where it is discovered that the premises cannot be put to their intended use because such use is prohibited by a municipal ordinance, of which fact both parties were ignorant at the time, and acted under a mutual mistaken belief that the proposed use was within the law.<sup>69</sup> And so, where a lease specifies that the property is to be used for a liquor saloon, it is terminated by a subsequent statute making the sale of intoxicating liquors in that city unlawful, and therefore the landlord cannot maintain an action for subsequent rent, on the lessee's refusal to occupy the premises further or pay any more rent.<sup>70</sup> But it seems that a lease for such specified purposes is not rendered void by the lessee's failure to obtain a license for the sale of liquor,<sup>71</sup> unless the lease itself contains a provision authorizing him to cancel

<sup>66</sup> *Holtzclaw v. Blackerby*, 9 Bush (Ky.) 40; *Craig v. Prather*, 2 B. Mon. (Ky.) 9.

<sup>67</sup> *George v. New England Mortgage Security Co.*, 109 Ala. 548, 20 South. 331; *Ross v. New England Mortgage Security Co.*, 101 Ala. 362, 13 South. 564; *New England Mortgage Security Co. v. Powell*, 97 Ala. 483, 12 South. 55. And see *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086.

<sup>68</sup> *Mumford v. American Life Ins. & Trust Co.*, 4 N. Y. 463.

<sup>69</sup> *Hannah v. Steinman*, 159 Cal. 142, 112 Pac. 1094; *Altgelt v. Gerblc* (Tex. Civ. App.) 149 S. W. 233.

<sup>70</sup> *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. (N. S.) 964, 130 Am. St. Rep. 753. But compare *Baughman v. Portman*, 11 Ky. Law Rep. 181.

<sup>71</sup> *Gaston v. Gordon*, 208 Mass. 265, 94 N. E. 307.

it in that contingency.<sup>72</sup> But a lease made with the knowledge and intention of the lessor that the demised premises are to be used for illegal purposes is unenforceable, and this is so whether the illegality appears on the face of the lease or is shown by outside evidence.<sup>73</sup> However, it is said that a lease of premises for five years, providing that the premises shall be used only for a liquor saloon, is not invalid as against public policy, although the statutes make it unlawful to retail intoxicating liquor without a license, and provide for the granting of licenses for one year only, for the illegality is not in the business, but in the manner in which it is conducted.<sup>74</sup>

It is an important corollary from these principles that where a contract is illegal because expressly prohibited by law, no action can be maintained for damages for its breach, nor for breach of warranty, nor for fraud or false representations inducing the contract.<sup>75</sup> But a valid and subsisting debt is not destroyed because included in a security or made the subject of a prohibited contract. Although formally satisfied and discharged and the security surrendered, it may be revived and enforced in case the new security is avoided.<sup>76</sup>

**§ 319. Monopolies and Restraints of Trade.**—A contract which tends or is meant to create a monopoly, or which is in unlawful restraint of trade, is illegal in the general sense of the term, so as to be subject to the general rules discussed in this chapter. If carried into execution or completed, the courts will not assist either party to rescind or undo it,<sup>77</sup> unless, perhaps, in cases where the party applying for relief was not in *pari delicto* with the other, which may be the case where he was induced by false and fraudulent rep-

<sup>72</sup> *Fred Miller Brewing Co. v. Fleming* (Tex. Civ. App.) 143 S. W. 300.

<sup>73</sup> *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25.

<sup>74</sup> *Burgett v. Loeb*, 43 Ind. App. 657, 88 N. E. 346.

<sup>75</sup> *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028; *L. D. Garrett Co. v. Morton*, 35 Misc. Rep. 10, 71 N. Y. Supp. 17.

<sup>76</sup> *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609.

<sup>77</sup> *Sportsman Shot Co. v. American Shot & Lead Co.*, 30 Wkly. Law Bul. (Ohio) 87.

resentations to enter into the contract,<sup>78</sup> or did so under a genuine mistake as to the law.<sup>79</sup> So, where an owner of stock in a corporation gives a power of attorney to a third person to sell his stock, if necessary, to raise funds to protect his interests and those of the corporation, and the third person wrongfully and secretly disposes of the stock to another corporation, the object being to enable the one company to acquire control over the other and so to stifle competition, the selling stockholder is considered less blameworthy than the purchasing corporation, and therefore the "pari delicto" rule should not be allowed to prevent a rescission of the sale.<sup>80</sup> But equity will in no circumstances lend its aid to one monopoly as against another.<sup>81</sup> And on the same principle the courts will not aid in distributing the profits of a business carried on in unlawful restraint of trade or monopolistic in its character,<sup>82</sup> nor compel an accounting between two partners as to the profits accruing from such a business.<sup>83</sup> So, equity will not lend its aid to a member of an unlawful association in restraint of trade to enable him to retain his membership therein, or to restrain the association from suspending or expelling him for a violation of its illegal rules.<sup>84</sup>

On the other hand, while a contract which is illegal for these reasons remains executory, the courts will not assist either party in enforcing it.<sup>85</sup> Thus, equity will not enforce by injunction a traffic agreement between two railroad companies by which one of them is restrained from competing with the other.<sup>86</sup> And where a lease by a railroad company of a portion of its authorized route is void as against pub-

<sup>78</sup> *H. T. Conde Implement Co. v. Grigsby & Co.*, 26 Ky. Law Rep. 768, 82 S. W. 458.

<sup>79</sup> *Chalmers Chemical Co. v. Chadeloid Chemical Co.* (C. C.) 175 Fed. 995.

<sup>80</sup> *Dunbar v. American Telephone & Telegraph Co.*, 238 Ill. 456, 87 N. E. 521.

<sup>81</sup> *Kuhn v. Woolson Spice Co.*, 8 Ohio N. P. 686.

<sup>82</sup> *Meyers v. Merillion*, 118 Cal. 352, 50 Pac. 662.

<sup>83</sup> *Wiggins v. Bisso*, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

<sup>84</sup> *Greer v. Payne*, 4 Kan. App. 153, 46 Pac. 190.

<sup>85</sup> *Fisher v. Flickinger Wheel Co.*, 28 Ohio Cir. Ct. R. 501.

<sup>86</sup> *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.*, 8 Del. Ch. 468, 46 Atl. 12.

lic policy, equity will not assist the lessor to enforce against the lessee a naked legal right of forfeiture for breach of conditions provided for in such lease.<sup>87</sup> But the contract remaining executory, either party has the legal right to disaffirm or rescind it, and may invoke the aid of the courts to that purpose.<sup>88</sup> It must be clear, however, that the contract or transaction in question is really contrary to the common law or within the terms of the anti-trust statutes. It has been ruled that a railroad company is not justified in refusing to observe a contract with another company for a division of rates on through shipments, apparently valid, because of an opinion of the Interstate Commerce Commission, delivered in a proceeding to which neither of the companies was a party, to the general effect that such agreements are illegal.<sup>89</sup> And the fact that a corporation is an illegal combination in restraint of trade, under the Sherman anti-trust law, does not prevent it from recovering the purchase price of goods sold and delivered by it.<sup>90</sup> But where certain bonds were issued pursuant to an agreement in violation of the anti-trust law, a later issue in renewal of such bonds at their maturity, and after the issuing company had ceased to do business illegally, could not have the effect of relieving the transaction of the taint of illegality.<sup>91</sup>

§ 320. **Ultra Vires Contracts.**—A contract which is beyond the lawful powers of one of the contracting parties, a corporation, may be rescinded or avoided by either of the parties so long as it remains executory.<sup>92</sup> Thus, where a corporation subscribes for stock in a proposed corpora-

<sup>87</sup> *Brooklyn & R. B. R. Co. v. Long Island R. Co.*, 72 App. Div. 496, 76 N. Y. Supp. 777.

<sup>88</sup> *Strait v. National Harrow Co.* (Sup.) 18 N. Y. Supp. 224.

<sup>89</sup> *Malvern & F. V. R. Co. v. Chicago, R. I. & P. Ry. Co.* (C. C.) 182 Fed. 685.

<sup>90</sup> *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 898, 59 L. Ed. 520, Ann. Cas. 1916A, 118.

<sup>91</sup> *Perry v. United States School Furniture Co.*, 232 Ill. 101, 83 N. E. 444.

<sup>92</sup> *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415; *Lithgow Mfg. Co. v. Fitch*, 5 Ky. Law Rep. 605; *General Bonding & Casualty Ins. Co. v. Mosely* (Tex. Civ. App.) 174 S. W. 1031.

tion of a different character, which is ultra vires, the subscription may be withdrawn and canceled before any act is done or any money expended in reliance on it.<sup>93</sup> And where a corporation has transcended its powers in making a given contract, it has even been thought that rescission, on its initiative, was not so much a privilege as a duty. In the case of such a contract it has been said: "It is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done."<sup>94</sup> But it must be observed that of late years, except in the federal courts, the doctrine of ultra vires as a defense or a ground for rescission has come to be regarded with scant tolerance. "An action by the corporation itself, or by the party contracted with, to repudiate an ultra vires act is not favored by the courts. Such an action is an attempt by a party to evade the contract by means of principles of law which both parties have violated or waived the benefit of. The court is not swift to grant relief in such cases."<sup>95</sup> Thus it is said in a late case that the plea of ultra vires will be sustained as a corporate defense to contracts otherwise unobjectionable only where the most persuasive conditions of public policy are involved and required.<sup>96</sup> And since the repudiation of corporate contracts on the sole ground of their being ultra vires may often disappoint the reasonable expectations of those dealing with them, and even work hardship, the courts have been much disposed to prevent such results from ensuing by giving weight to the plea of estoppel

<sup>93</sup> *Holt v. Winfield Bank* (C. C.) 25 Fed. 812.

<sup>94</sup> *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950.

<sup>95</sup> 2 *Cook, Corporations*, § 681. In the same place it is observed that, "In the federal courts, the old rule against ultra vires contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurisprudence to relax on that subject finds no favor in the federal courts."

<sup>96</sup> *Seamless Pressed Steel & Mfg. Co. v. Monroe* (Ind. App.) 106 N. E. 538.

against the corporation. Thus, it is said: "Courts have frequently held that, while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of conditions by another party, attempts to avoid the contract by a plea of ultra vires."<sup>87</sup> But where a contract between a corporation and another is not only ultra vires but illegal, and the parties are in *pari delicto*, the one cannot enforce it on the ground that the other, having received the benefits of it, is estopped to assert its invalidity.<sup>88</sup> Moreover, if there is any doubt as to the particular act being within or beyond the lawful powers of the corporation, it will be resolved in such a way as to sustain the validity of the transaction. The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate its contracts, particularly after having enjoyed the benefits of them.<sup>89</sup> Also it may be a question whether a party dealing with a corporation can rightly be presumed to know the extent of its corporate powers. The court in New York has said that "when the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence if the question of power depends not merely upon the law under which the corpo-

<sup>87</sup> *Nims v. Mount Hermon Boys' School*, 100 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. Rep. 467. And see *Bossert v. Gels* (Ind. App.) 107 N. E. 95.

<sup>88</sup> *Minnesota, D. & P. Ry. Co. v. Way*, 34 S. D. 435, 148 N. W. 858, L. R. A. 1915B, 925.

<sup>89</sup> *Tod v. Kentucky Union Land Co.* (C. C.) 57 Fed. 47; *Chicago, R. I. & P. Ry. Co. v. Union Pac. Ry. Co.* (C. C.) 47 Fed. 15.

ration acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation will be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."<sup>100</sup> And in a case where the plaintiff was induced to accept a policy of insurance issued by the defendant company on the false representation that it had authority under the law to issue policies of that particular kind, it was held that he was not required to be conversant with the law on the subject, and when a loss occurred and the company repudiated its obligation on the plea of ultra vires, it was considered that the misrepresentation, resulting in injury to the plaintiff, constituted an actionable tort.<sup>101</sup>

But ultra vires is not a ground for reopening or avoiding a transaction which has been completely executed.<sup>102</sup> "The true rule is that when the transaction is complete, and the party seeking relief has performed on his part, the plea of ultra vires by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status."<sup>103</sup> In a case before the Supreme Court of the United States, it was in evidence that an Illinois railroad corporation had leased its property to an Indiana corporation for the term of 999 years, the lessee corporation having no authority under its charter or the general laws to take such a lease. It was held that the transaction was unlawful and wholly void, but that the lessor corporation was bound to take notice that its lease

<sup>100</sup> *Bissell v. Michigan Southern & Northern Indiana R. Cos.*, 22 N. Y. 258, 290.

<sup>101</sup> *Harris-Emery Co. v. Pitcairn*, 122 Iowa, 595, 98 N. W. 476.

<sup>102</sup> *Chase & Baker Co. v. National Trust & Credit Co.* (D. C.) 215 Fed. 633; *Welles v. River Raisin & G. R. R. Co.*, Walk. Ch. (Mich.) 35; *Barrow v. Nashville & Charlotte Turnpike Co.*, 9 Humph. (Tenn.) 304. See *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 229 Pa. 1, 77 Atl. 1008.

<sup>103</sup> *Camden & Atlantic R. Co. v. May's Landing & Egg Harbor City R. Co.*, 48 N. J. Law, 530, 567, 7 Atl. 523.



was ultra vires of the lessee, and as the lease had become an executed contract by the delivery of the leased property, the lessor was in *pari delicto* with the lessee, and could not maintain a suit to recover possession.<sup>104</sup>

If an ultra vires contract is to be rescinded or avoided on that ground, it can only be done in accordance with equitable principles, and this involves the restoration of whatever may have been received under the contract or payment for any benefits enjoyed.<sup>105</sup> Thus, assuming that one of the parties to an ultra vires contract may repudiate and rescind it, equity will not help him or give him any relief unless he first offers to return any property he may have received under the contract, or make compensation therefor, or return any benefit which has accrued to him.<sup>106</sup>

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to af-

<sup>104</sup> *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748.

<sup>105</sup> *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157; *New Castle Northern R. Co. v. Simpson (C. C.)* 23 Fed. 214; *Bowen v. Needles Nat. Bank*, 94 Fed. 925, 36 C. C. A. 553; *Southern B. & L. Ass'n v. Casa Grand Livery Stable Co.*, 119 Ala. 175, 24 South. 886.

<sup>106</sup> *Memphis & L. R. Co. v. Dow (C. C.)* 19 Fed. 388; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. 465, 7 Am. St. Rep. 515; *Manville v. Belden Min. Co. (C. C.)* 17 Fed. 425; *United Lines Tel. Co. v. Boston Safe Deposit & Trust Co.*, 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231; *Buford v. Keokuk Northern Line Packet Co.*, 69 Mo. 611.

firm, but to disaffirm, the unlawful contract.”<sup>107</sup> Thus, where a municipal corporation had contracted with a private party for the improvement of its sidewalks, and the only invalid element of the contract was that it promised to pay in bonds, which it had no lawful power to issue, and the corporation attempted to repudiate the contract as ultra vires, it was held that it was liable in damages for such benefits as it had already received from the contractor’s performance of the contract.<sup>108</sup>

**§ 321. Compounding Crime or Stifling Prosecution.—**When a contract, conveyance, or mortgage is given for the purpose of compounding a felony or stifling a criminal prosecution, neither of the parties to it can obtain the aid of the courts in either enforcing it or setting it aside. The grantor or mortgagor, for instance, cannot obtain a decree for the cancellation of the instrument or its removal as an incumbrance.<sup>109</sup> This rule is based on the maxim, “*in pari delicto potior est conditio defendentis*,” that is to say, both parties being participants in the illegal arrangement and therefore equally guilty, neither can maintain an action against the other founded upon it.<sup>110</sup> But the courts are always willing to inquire whether they are in fact equally guilty or not, and to give relief to the one found free from blame. Thus, if a person gives a note, mortgage, or deed in consideration of the settlement of a claim growing out of a crime, or in consideration of forbearance to prosecute, but is induced to do so by duress, undue influence, or by the paralysing effect of threats which he has not the courage or strength of mind to resist, he may obtain relief in eq-

<sup>107</sup> *Central Transp. Co. v. Pullman’s Palace Car Co.*, 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55. And see *Bowen v. Needles Nat. Bank*, 94 Fed. 925, 36 C. C. A. 553.

<sup>108</sup> *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

<sup>109</sup> *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Allison v. Hess*, 28 Iowa, 388; *Swartz v. Gillett*, 1 Chand. (Wis.) 207; *Teague v. Williams*, 6 Tex. Civ. App. 468, 25 S. W. 1048.

<sup>110</sup> *Gotwalt v. Neal*, 25 Md. 434; *Paige v. Hieronymus*, 180 Ill. 637, 54 N. E. 583; *Booker v. Wingo*, 29 S. C. 116, 7 S. E. 49. On this principle, no action can be maintained on a note given in consideration of the suppression of a criminal prosecution. *Lucas v. Castelow*, 8 Ga. App. 812, 70 S. E. 184; *Stanard v. Sampson*, 23 Okl. 13, 99 Pac. 796.

uity.<sup>111</sup> The rule is different in the case of an unperformed contract based on a vicious consideration of this kind, for so long as it remains executory, it may be repudiated and avoided. Thus, an action will lie to procure the surrender or cancellation of a promissory note given as the price of forbearing or stopping a prosecution for a criminal offense.<sup>112</sup> But the guardian of a ward guilty of embezzlement may not sue in equity for leave to pay the amount embezzled, where, unless that is done, the ward will be prosecuted for the crime, and where, if the deficiency is made up, no prosecution will ensue, for the court will not aid the guardian in compounding a felony.<sup>113</sup>

§ 322. **Contracts Contrary to Public Policy.**—A court of equity will not lend its aid in the enforcement of rights or claims arising out of contracts which are contrary to public policy,<sup>114</sup> nor allow its jurisdiction and process to be availed of for the purpose of dividing among the participants in such a contract the profits which have been realized from it.<sup>115</sup> If the contract is entire and every part of

<sup>111</sup> *Bryant v. Peck & Whipple Co.*, 154 Mass. 460, 28 N. E. 678; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; *Burton v. McMillan*, 52 Fla. 469, 42 South. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. Rep. 220, 11 Ann. Cas. 380; *Ball v. Ward*, 76 N. J. Eq. 8, 74 Atl. 158.

<sup>112</sup> *Moon v. Martin*, 122 Ind. 211, 23 N. E. 668; *Stout v. Turner*, 102 Ind. 418, 26 N. E. 85; *Shriver v. McCann* (Tex. Civ. App.) 155 S. W. 317; *Frick v. Moore*, 82 Ga. 159, 8 S. E. 80; *Loomis v. Cline*, 4 Barb. (N. Y.) 453. Compare *Atwood v. Flisk*, 101 Mass. 363, 100 Am. Dec. 124.

<sup>113</sup> *Hays v. Brown* (Ky.) 128 S. W. 1061.

<sup>114</sup> *Perry v. United States School Furniture Co.*, 232 Ill. 101, 83 N. E. 444; *Western Union Tel. Co. v. Postal Tel. Co.*, 217 Fed. 533, 133 O. C. A. 385 (contract by a railroad company giving a telegraph company the exclusive right to maintain a telegraph line upon its right of way); *Hazelton v. Sheckels*, 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217 (contract for lobbying services). But compare as to this last, *Mann v. Mercer County Court*, 58 W. Va. 651, 52 S. E. 776, holding that fraud perpetrated by private persons in the procurement of the exercise of a legislative or governmental power does not of itself afford a ground of equity jurisdiction, unless it is expressly given by statute. As to notes or deeds made for the purpose of influencing voters in an election, or the future conduct of the successful candidate, see *Campbell v. Offutt* (Ky.) 151 S. W. 403; *Lamro Townsite Co. v. Bank of Dallas* (S. D.) 151 N. W. 282.

<sup>115</sup> *Lucas v. Allen*, 80 Ky. 681, 4 Ky. Law Rep. 687.

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husband and wife to divide their property and live separate and apart for the remainder of their lives is contrary to public policy (which is not by any means clear), it cannot be undone and the property rights readjusted after the death of one of the parties.<sup>121</sup>

§ 323. **Fraudulent Transfers and Schemes to Defraud.** It is a familiar rule of law that one who places his property in the name of another, for the purpose of defeating the just claims of his existing creditors, cannot have the aid of the courts to recover back the property or cancel the instrument by which it was transferred.<sup>122</sup> And the same principle applies to those who participate in, or seek to profit by, any actual fraud against individuals or the public. Thus, one who purchases stock in a corporation, being well aware that it owes its existence to a scheme to defraud the public, can have no relief in equity on the ground of fraud and deceit.<sup>123</sup> And where a contract for the manufacture and sale of a commodity intends that the buyer shall be falsely held out to the public as the manufacturer, with intent to defraud, it is unenforceable.<sup>124</sup> So, where notes are given as part of a scheme to defraud the public, the fact that in suing on them at law it is not necessary to bring in the illegal transaction in order to make out a *prima facie* case does not deprive the defendant of his equitable right to have the notes canceled, and he may have this relief without returning what he has received as a consideration for them.<sup>125</sup>

<sup>121</sup> See *Anderson v. Anderson*, 122 Wis. 480, 100 N. W. 829; *Daniels v. Benedict*, 97 Fed. 367, 38 C. C. A. 592.

<sup>122</sup> *Schermerhorn v. De Chambrun*, 64 Fed. 195, 12 C. C. A. 81; *Butts v. Goodan's Ex'r*, 5 Ky. Law Rep. 770; *Powell v. Ivey*, 88 N. C. 256; *Smith v. Grim*, 26 Pa. 95, 67 Am. Dec. 400; *Barton v. Morris*, 15 Ohio, 408; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266.

<sup>123</sup> *Ryan v. Miller*, 236 Mo. 496, 139 S. W. 128, Ann. Cas. 1912D, 540.

<sup>124</sup> *H. E. Pogue Distillery Co. v. Paxton Bros. Co.* (D. C.) 209 Fed. 108. So, where an agreement is made that an encyclopedia shall be represented to the public as the work of a magazine publisher, the purpose being to take advantage of the good reputation of the magazine, and so to mislead the public, a court of equity will not grant such publisher an accounting under the contract. *Munn & Co. v. Americana Co.*, 83 N. J. Eq. 679, 92 Atl. 344.

<sup>125</sup> *Champion Funding & Foundry Co. v. Heskett*, 125 Mo. App. 516, 102 S. W. 1050.

Generally, however, where a contract thus tainted with fraud has been fully executed, equity will not aid either party to have it canceled or set aside.<sup>126</sup> Thus, one who procured subscriptions to a contract, and fraudulently agreed to indemnify one of the subscribers against liability, cannot compel the latter to perform a collateral agreement relating to the transaction, since equity will leave both parties to the fraud where it finds them.<sup>127</sup>

**§ 324. Contracts Violating Sunday Laws.**—Where the laws of the particular state, prohibiting the transaction of business on Sunday, are so framed as to make contracts entered into on that day illegal, the courts will not assist either party to a Sunday contract to enforce it, so far as it remains executory, nor sustain an action for the breach of it, nor decree specific performance or an accounting in respect to it.<sup>128</sup> “The ground upon which courts refuse to entertain actions on contracts made in contravention of the Sunday statutes is because one who has participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.”<sup>129</sup> Or, as stated in an old English decision, “it sounds very ill in the mouth of a defendant that a contract is immoral or illegal as between him and a plaintiff. But it is not for him that the objection is allowed. It is because the court will not lend its aid to one who founds his cause of action upon an illegal act.”<sup>130</sup> But while the courts will not enforce an executory contract violative of the Sunday laws, yet either party may repudiate and rescind it on account of its illegality, and demand restoration of any thing of value which he may have parted with under the contract, being likewise bound to do equity by a similar

<sup>126</sup> *Cincinnati, H. & D. R. Co. v. McKeen*, 64 Fed. 36, 12 C. C. A. 14.

<sup>127</sup> *Sicklesteel v. Edmonds*, 158 Wis. 122, 147 N. W. 1024.

<sup>128</sup> *Calhoun v. Phillips*, 87 Ga. 482, 13 S. E. 593; *Shepley v. Henry Siegel Co.*, 203 Mass. 43, 88 N. E. 1095; *Illingworth v. Bloemecke*, 67 N. J. Eq. 483, 58 Atl. 566; *Chestnut v. Harbaugh*, 78 Pa. 473.

<sup>129</sup> *Collins v. Collins*, 139 Iowa, 703, 117 N. W. 1089, 18 L. R. A. (N. S.) 1176, 16 Ann. Cas. 630.

<sup>130</sup> *Holman v. Johnson*, Cowp. 343.

restitution on his own part.<sup>181</sup> But it should be observed that a valid contract cannot be terminated or in any way impaired by a rescission declared or demanded on Sunday, the act of rescission being within the scope of the Sunday laws and therefore illegal if taking place on that day.<sup>182</sup>

But where a contract made on Sunday is fully executed, and the parties are in *pari delicto*, the law will not aid either of them to rescind the contract or recover what he has given under it, but will leave both parties where it finds them.<sup>183</sup> Thus, a deed conveying land in trust will not be set aside on the sole ground that it was executed and delivered on Sunday, the transaction being fully executed.<sup>184</sup> And a principal cannot repudiate, as beyond the agent's authority, a contract made and completely executed by the agent on Sunday in violation of the Sunday laws, the contract itself being within the agent's authority, for the mere fact that it was made on Sunday does not take it out of the scope of that authority.<sup>185</sup> In some states, however, the courts will give their aid to enforce the rescission of a contract void because entered into on Sunday, as in Michigan, where it has been said: "Whether the supposed contract has been executed or remains executory, we think the rights of the parties are to be determined in the same manner as if no such contract had ever been made. The con-

<sup>181</sup> *Brown v. Timmany*, 20 Ohio, 81; *Adams v. Gay*, 19 Vt. 358; *King v. Green*, 6 Allen (Mass.) 139.

<sup>182</sup> *Benedict v. Bachelder*, 24 Mich. 425, 9 Am. Rep. 130; *Merritt v. Robinson*, 35 Ark. 483; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368. Compare *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420, holding that the statute of Nevada, where the transaction took place, did not prohibit the rescission of a contract on Sunday.

<sup>183</sup> *Thornhill v. O'Rear*, 108 Ala. 299, 19 South. 382, 31 L. R. A. 792; *Tucker v. West*, 29 Ark. 386; *Ellis v. Hammond*, 57 Ga. 179; *Jordan v. Moore*, 10 Ind. 386; *Plaisted v. Palmer*, 63 Me. 576; *Rickards v. Rickards*, 98 Md. 136, 56 Atl. 397, 63 L. R. A. 724, 103 Am. St. Rep. 393; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Foster v. Wooten*, 67 Miss. 540, 7 South. 501; *Smith v. Bean*, 15 N. H. 577; *Brown v. Timmany*, 20 Ohio, 81; *Moore v. Kendall*, 1 Chand. (Wis.) 33, 52 Am. Dec. 145; *Cohn v. Heimbauch*, 86 Wis. 176, 56 N. W. 638; *Smith v. Sparrow*, 4 Bing. 84; *Fennell v. Ridler*, 5 Barn. & C. 406.

<sup>184</sup> *Wilson v. Calhoun* (Iowa) 151 N. W. 1087.

<sup>185</sup> *Rickards v. Rickards*, 98 Md. 136, 56 Atl. 397, 63 L. R. A. 724, 103 Am. St. Rep. 393.



tract as such can neither be set up as the basis of an action nor as a ground of defense. If it be a contract of sale accompanied by payment and delivery, as supposed in the present case, no property passes, and the vendor, by tendering back what he has received, may reclaim the property, and the vendee, on tendering back the property, may recover the money or property given in payment or exchange as if no pretense of such contract existed."<sup>136</sup> But the general doctrine is that if rescission of a contract made and fully executed on Sunday is asked by one of the parties and refused by the other, the former cannot maintain replevin to recover the property he parted with under the contract.<sup>137</sup> And in the case of a sale and delivery of goods on Sunday, void under the laws of the state for that reason, "if the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession."<sup>138</sup> Thus, in a case in Iowa, plaintiff and defendant made a horse trade on Sunday, defendant leaving his horse with plaintiff, and taking the horse of plaintiff with him. A day or so later defendant, without plaintiff's knowledge, returned the horse he had received and took his own from plaintiff's stable. It was held that as the original contract was an unlawful one, the court would render no aid to either party, and as the plaintiff's possession was prima facie evidence of ownership, he might, on the strength of that possession and the trespass of defendant, maintain replevin for the horse so taken away by defendant.<sup>139</sup> In some states, also, it has been held that where an illegal sale of goods on Sunday has been consummated by delivery, the vendor may demand their return to him, and if the purchaser refuses to comply, the vendor may then maintain trover.<sup>140</sup> A learned writer observes: "While the mere retention on Monday of goods

<sup>136</sup> *Tucker v. Mowrey*, 12 Mich. 378, followed in *Brazee v. Bryant*, 50 Mich. 136, 15 N. W. 49. And see *Smith v. Pearson*, 24 Ala. 355.

<sup>137</sup> *Kelley v. Cosgrove*, 83 Iowa, 229, 48 N. W. 979, 17 L. R. A. 779.

<sup>138</sup> *Smith v. Bean*, 15 N. H. 577.

<sup>139</sup> *Kinney v. McDermot*, 55 Iowa, 674, 8 N. W. 656, 39 Am. Rep. 191.

<sup>140</sup> *Dodson v. Harris*, 10 Ala. 566; *Tucker v. West*, 29 Ark. 386.

obtained on Sunday involves no promise to pay for them, and while the vendor, without exposing himself to an action of replevin, cannot reclaim the property, yet if, after demand, the purchaser admits the vendor's ownership, but refuses to return, he may be made liable in trover, or an admission of the vendor's ownership, with a request to retain the goods, may be the basis of a fresh *assumpsit*." <sup>141</sup> In a case in Vermont, where an exchange of property was made on Sunday, and one of the parties claimed to have been defrauded, and brought an action of trover, it was held that he might recover. But the exchange had been made in a foreign state, and as no proof was offered of the Sunday law of that state, the court decided the case as at common law, and sustained the action because, by the common law, the transaction would not have been illegal. <sup>142</sup>

Assuming a particular sale or other contract to have been within the scope of the Sunday laws, it is not open to a party who was deceived, defrauded, or misled in respect to the subject matter of the contract to maintain an action for damages therefor or for a breach of warranty, because, the contract being illegal and both parties in equal fault, the court will give no relief to either. <sup>143</sup> But there are some authorities to the effect that if a contract was induced by fraud or duress, or obtained from a person who was fraudulently made drunk for the purpose, or, generally, if any recognized and sufficient ground for its rescission exists, rescission will not be prevented by the fact that the contract was also illegal because made on Sunday. <sup>144</sup>

§ 325. Usurious Contracts.—A court of equity has jurisdiction and power to order the surrender and cancella-

<sup>141</sup> 1 Whart. Contr. § 384.

<sup>142</sup> *Adams v. Gay*, 19 Vt. 358.

<sup>143</sup> *Grant v. McGrath*, 56 Conn. 333, 15 Atl. 370; *Gunderson v. Richardson*, 56 Iowa, 56, 8 N. W. 683, 41 Am. Rep. 81; *Murphy v. Simpson*, 14 B. Mon. (Ky.) 419; *Plaisted v. Palmer*, 63 Me. 576; *Robeson v. French*, 12 Metc. (Mass.) 24, 45 Am. Dec. 236; *Hulet v. Stratton*, 5 Cush. (Mass.) 539; *Finley v. Quirk*, 9 Minn. 194 (Gil. 179), 86 Am. Dec. 93; *Sellers v. Dugan*, 18 Ohio, 489; *Lyon v. Strong*, 6 Vt. 219.

<sup>144</sup> *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151.

tion of a note, bond, or other obligation tainted with usury, and of any mortgage or other security which may accompany it.<sup>145</sup> Thus, when the holder of a chattel mortgage has taken possession of the mortgaged property for non-payment, thus depriving the borrower of his property and of the opportunity to establish at law the illegality of the mortgage because affected with usury, an action will lie in equity to cancel the mortgage.<sup>146</sup> This rule extends to all kinds and forms of securities. For instance, where an assignment of future wages is made at the time a usurious loan is contracted, and the amount of the money advanced together with legal interest has been paid or tendered in full, such assignment may be set aside and canceled by a court of equity.<sup>147</sup> And although usury is generally said to be a personal defense to the debtor, yet the transferee of property pledged as security for a usurious note is given by some statutes the right to sue for the cancellation of the note and the return of the security.<sup>148</sup> So also, an infant may avoid or repudiate a usurious contract entered into by him.<sup>149</sup> And an agreement to extend the time of payment of a debt, if founded on a usurious consideration, may be repudiated by either party, though the debt itself is valid. The creditor may sue for the debt at any time after the orig-

<sup>145</sup> *Ruddell v. Ambler*, 18 Ark. 369; *Pierce v. Middle Georgia Land & Lumber Co.*, 131 Ga. 99, 61 S. E. 1114; *R. J. & B. F. Camp Lumber Co. v. Citizens' Bank*, 142 Ga. 84, 82 S. E. 492; *Ferguson v. Sutphen*, 3 Gilman (8 Ill.) 547; *Wilhelmson v. Bentley*, 27 Neb. 658, 43 N. W. 397; *Cole v. Savage*, 1 Clarke Ch. (N. Y.) 482; *Taylor v. Grant*, 35 N. Y. Super. Ct. 353; *Von Haus v. Soule*, 146 App. Div. 731, 131 N. Y. Supp. 512; *Gilbert v. Real Estate Co.*, 155 App. Div. 411, 140 N. Y. Supp. 354; *Raspberry v. Jones*, 42 N. C. 146; *Caughman v. Drafts*, 1 Rich. Eq. (S. C.) 414; *Fox v. Tallafarro*, 4 Munf. (Va.) 243; *Interstate Savings & Trust Co. v. Hornsby* (Tex. Civ. App.) 146 S. W. 960; *Guarantee Savings Loan & Investment Co. v. Mitchell*, 44 Tex. Civ. App. 165, 99 S. W. 156. But see *Murray v. Judson*, 9 N. Y. 73, 59 Am. Dec. 516, holding that the debtor may avoid the original usurious contract, but not any assignment or appropriation of property made for the payment of the debt after it has been incurred.

<sup>146</sup> *Hager v. Arland*, 81 Misc. Rep. 421, 143 N. Y. Supp. 388; *Wetherell v. Stewart*, 35 Minn. 496, 29 N. W. 196.

<sup>147</sup> *Roberts v. Pennsylvania Loan & Trust Co.*, 39 Pa. Super. Ct. 358.

<sup>148</sup> *Dickson v. Valentine*, 57 N. Y. Super. Ct. 128, 6 N. Y. Supp. 540.

<sup>149</sup> *Millard v. Hewlett*, 19 Wend. (N. Y.) 301.

inal time for its payment, without regard to his agreement to extend, while the debtor, if he sets up the usury, cannot claim the benefit of the extension.<sup>150</sup> It is also within the jurisdiction of equity to enjoin the collection of a debt tainted with usury or the enforcement of securities given for it.<sup>151</sup> And it appears that, after the borrower has repaid the full amount of the money loaned, with the legal interest, he may maintain replevin against the lender to secure the return of the instrument evidencing the indebtedness.<sup>152</sup>

But the rule that he who seeks equity must do equity applies to a borrower who has given an obligation binding him to the payment of usurious interest. If he comes into equity asking affirmative relief, he must do equity by tendering or offering to pay the actual amount of money advanced to him together with interest at the legal rate, and if he fails to do this, many of the cases hold that his bill must be dismissed, though others take the view that, without such tender or offer, the court may order the property pledged to stand as security for the amount due with the interest.<sup>153</sup> Of course, any payments previously made by

<sup>150</sup> *Church v. Maloy*, 70 N. Y. 63; *Beauchamp v. Leagan*, 14 Ind. 101.

<sup>151</sup> *Crusins v. Slegman*, 81 Misc. Rep. 867, 142 N. Y. Supp. 348. See *Reiner v. Galinger*, 151 App. Div. 711, 136 N. Y. Supp. 205.

<sup>152</sup> *Griswold v. Dugane*, 148 Iowa, 504, 127 N. W. 664.

<sup>153</sup> *Chase & Baker Co. v. National Trust & Credit Co.* (D. C.) 215 Fed. 633; *Matthews v. Warner* (C. C.) 6 Fed. 461; *Norman v. Peper* (C. C.) 24 Fed. 408; *In re Hoole* (D. C.) 3 Fed. 496; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 9 South. 143, 13 L. R. A. 299; *Eslava v. Crampton*, 61 Ala. 507; *Hunt v. Acre*, 28 Ala. 580; *Anthony v. Lawson*, 34 Ark. 628; *Ruddell v. Ambler*, 18 Ark. 369; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Campbell v. Murray*, 62 Ga. 86; *Whatley v. Barker*, 79 Ga. 790, 4 S. E. 387; *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863; *Mapps v. Sharpe*, 32 Ill. 13; *Garlick v. Mutual L. & B. Ass'n*, 129 Ill. App. 402; *Ferguson v. Sutphen*, 3 Gilman (8 Ill.) 547; *Tooke v. Newman*, 75 Ill. 215; *Morrison v. Miller*, 46 Iowa, 84; *Walker v. Cockey*, 38 Md. 75; *Rush v. Pearson*, 92 Miss. 153, 45 South. 723; *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 12 South. 464, 30 Am. St. Rep. 587; *Deans v. Robertson*, 64 Miss. 195, 1 South. 159; *Eiseman v. Gallagher*, 24 Neb. 79, 37 N. W. 941; *Vanderveer v. Holcomb*, 17 N. J. Eq. 87; *Williams v. Fitzhugh*, 37 N. Y. 444; *Cole v. Savage*, 1 Clarke Ch. (N. Y.) 482; *Beecher v. Ackerman*, 1 Abb. Prac. (N. Y.) N. S. 141; *Ballinger v. Edwards*, 39 N. C. 449; *Purnell v. Vaughan*,

the debtor are to be deducted from the amount of the principal debt and lawful interest,<sup>154</sup> and payments on a usurious contract will be applied at the borrower's election first upon the legal interest due and then upon the principal, so that usury will not be regarded as having been paid until the legal interest and the principal have been satisfied,<sup>155</sup> and if the entire debt, exclusive of usury, has thus been discharged, nothing more is required of the debtor seeking the cancellation of his note or mortgage.<sup>156</sup> On similar principles, where a lender conveyed to the borrower, under a usurious contract, certain premises at a price above their actual value, taking a bond and mortgage on the property for the agreed price, it was held that a subsequent grantee of the mortgaged premises could not sue to set aside the mortgage without paying the actual value of the property at the time the mortgage was executed.<sup>157</sup> It should be observed, however, that the rule requiring tender of the debt with legal interest, as a condition upon relief in equity, has been abrogated by statute in some states,<sup>158</sup> and is occasionally relaxed in exceptional cases.<sup>159</sup> And the rule is different where the borrower is the defendant, and, instead of seeking affirmative relief, sets up the usury in defense to the action. In this case, he is not required to tender either principal or legal interest,<sup>160</sup> unless the local

82 N. C. 134; *Owens v. Wright*, 161 N. C. 127, 76 S. E. 735, Ann. Cas. 1914D, 1021; *Rietz v. Foeste*, 30 Wis. 693. But compare *Mumford v. American Life Ins. & Trust Co.*, 4 N. Y. 463.

<sup>154</sup> *Quinn v. First Nat. Bank*, 8 Ga. App. 235, 68 S. E. 1010.

<sup>155</sup> *Paine v. Levy*, 142 Ky. 619, 134 S. W. 1160.

<sup>156</sup> *Valentine v. Fish*, 45 Ill. 462.

<sup>157</sup> *Bissell v. Kellogg*, 65 N. Y. 432.

<sup>158</sup> *First Nat. Bank v. Clark*, 161 Ala. 497, 49 South. 807.

<sup>159</sup> See *Henderson v. Tolman*, 130 Mo. App. 498, 109 S. W. 76, holding that an assignment of wages in the nature of a chattel mortgage to secure a loan, which is illegal and void because usurious, may be canceled in equity without a tender of the sum originally borrowed. So, in Texas, the doctrine that cancellation is only to be granted on payment of the debt and legal interest is not applicable to a suit to cancel a building and loan mortgage and contract which is alleged not to represent the real contract, but to be a device to evade the usury laws. *Walter v. Mutual Home Sav. Ass'n*, 29 Tex. Civ. App. 379, 68 S. W. 536.

<sup>160</sup> *Union Bank v. Bell*, 14 Ohio St. 200; *Gore v. Lewis*, 109 N. C. 539, 13 S. E. 909; *Kuhner v. Butler*, 11 Iowa, 419.

statute so requires.<sup>161</sup> But in an action to rescind a contract for the sale of land and to recover the land for non-payment of the purchase price, in which the defendant admitted that more than half the price was unpaid, and was a legal charge on the land, it was held that a judgment for the recovery of the land should not be reversed because the interest provided for in the contract of sale was usurious.<sup>162</sup> Following the general rule in regard to illegal contracts, it is held that, after a usurious contract has been fully executed and performed, a court of equity will not interfere in aid of either of the parties (in the absence of a statute authorizing it to do so) by opening up and readjusting the transaction.<sup>163</sup>

While the laws against usury are ordinarily administered as between a borrower and a lender, there may be other cases in which this form of illegality will so taint a right or claim as to cause it to be rejected by the courts. Thus, in a case in Mississippi, it appeared that a lender of money at extortionate rates of interest and by contracts void as against public policy established a branch or agency and placed the defendant in charge of it. Afterwards the defendant claimed the business as his own and refused to account. It was held that the principal could not maintain a bill to recover money alleged to have been made, and for an injunction and receivership, since he would have to depend for a decree on the illegal contracts and transactions.<sup>164</sup>

<sup>161</sup> *Shawmut Commercial Paper Co. v. Brigham*, 211 Mass. 72, 97 N. E. 636.

<sup>162</sup> *Hood v. People's Bldg. & Sav. Ass'n*, 8 Tex. Civ. App. 385, 27 S. W. 1046.

<sup>163</sup> *Chase & Baker Co. v. National Trust & Credit Co.* (D. C.) 215 Fed. 633; *Irwin v. McKnight*, 76 Ga. 669; *Fessenden v. Taft*, 65 N. H. 89, 17 Atl. 713.

<sup>164</sup> *Woodson v. Hopkins*, 85 Miss. 171, 87 South. 1000, 38 South. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275.

## CHAPTER XIV

## BANKRUPTCY AND INSOLVENCY

- § 326. Effect of Bankruptcy on Executory Contracts in General
- 327. Bankruptcy as Anticipatory Breach of Contract.
- 328. Executory and Option Contracts of Sale.
- 329. Conditional Sales.
- 330. Relation of Landlord and Tenant.
- 331. Election as to Rescission.

§ 326. **Effect of Bankruptcy on Executory Contracts General.**—In all cases of ordinary executory contracts, the bankruptcy of one of the contracting parties does not operate to dissolve the contract nor give to the other party the right to rescind it. This privilege may be exercised by the trustee, who has the right to repudiate the contract if he deems it onerous or unprofitable to the estate in his charge. But if he is willing to continue and complete it, the other party cannot withdraw. In an important case on this subject it was said: "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt. Its effect is to transfer to the trustee the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contractual obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements and subject to the liabilities he has incurred. \* \* \* One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; agrees to purchase or to convey property; and then he becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency



may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so, throughout the entire field of contractual obligations, the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability.”<sup>1</sup> And in another bankruptcy case it was said: “As a legal proposition, insolvency or bankruptcy alone does not, in a contract of this kind, constitute either a breach or authorize its rescission or abandonment, for it may be finally and fully performed by others who may be acting, for instance, as trustee or as successors or purchasers of the bankrupt’s property and rights involved therein or affected thereby.”<sup>2</sup> Thus, for example, it is doubtful whether a subcontractor is entitled to disaffirm a contract to furnish building material on account of the insolvency of the general contractor, but even if he is so entitled, his failing to repudiate after knowledge of the facts, and his calling on the owner in collecting his money will be held to constitute a ratification.<sup>3</sup> On similar principles, a rescission of a contract to purchase stock, inchoate at the time of the bankruptcy of the corporation, is not binding on creditors of the corporation who become such after the subscription is made and before the proposed rescis-

<sup>1</sup> *Watson v. Merrill*, 136 Fed. 359, 69 C. O. A. 185, 69 L. R. A. 719.

<sup>2</sup> *In re Morgantown Tin Plate Co.* (D. C.) 184 Fed. 109, citing *Lester v. Webb*, 5 Allen (Mass.) 569; *Carey v. Nagle*, Fed. Cas. No. 2,403; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

<sup>3</sup> *University of Virginia v. Snyder*, 100 Va. 567, 42 S. E. 337.

sion.<sup>4</sup> And the fact that a director of a corporation becomes insolvent or even bankrupt does not vacate his office.<sup>5</sup>

But naturally an exception to this general rule must be made in the case of such executory contracts as relate to purely personal services or involve the element of personal trust or confidence. These contracts cannot be assumed by the trustee in bankruptcy, because the other party cannot be compelled to accept him as a substitute for the bankrupt, and if the bankruptcy makes performance by the bankrupt impossible, the other party may terminate or rescind the contract.<sup>6</sup> Thus the bankruptcy of either the principal or the agent, in a contract of agency, operates as a rescission of the contract and terminates the authority of the agent, except in cases of a power coupled with an interest.<sup>7</sup> And so, the bankruptcy of one partner ipso facto dissolves the partnership, and the trustee in bankruptcy becomes tenant in common with the solvent partner in the joint stock.<sup>8</sup> So, where a note is given as the price of a scholarship in an incorporated academy, and the academy becomes insolvent and ceases to impart instruction, the trustees thereof have power to cancel their promise to teach the promissor's nominee so long as interest was paid on the note, and thereupon to surrender the note.<sup>9</sup> As to the effect of the bankruptcy of an employer on the contract of employment, it is generally held that this event gives the employé the right to consider his contract as dissolved, especially where the employer is a corporation or a partnership, and he may prove a claim for the unpaid balance of his salary to the time of the filing of the petition in bankruptcy, if it was fixed by a valid written contract or other instrument, or otherwise he may claim the reason-

<sup>4</sup> *In re American Nat. Beverage Co.* (D. C.) 193 Fed. 772.

<sup>5</sup> *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. 537, Fed. Cas. No. 635.

<sup>6</sup> See, *supra*, § 208. And see Black, Bankr. § 306.

<sup>7</sup> *Audenried v. Betteley*, 8 Allen (Mass.) 302; *Ogden v. Gillingham*, Baldw. 38, Fed. Cas. No. 10,456; *In re Daniels*, 6 Biss. 405, Fed. Cas. No. 3,566.

<sup>8</sup> *Wilkins v. Davis*, 2 Low. 511, Fed. Cas. No. 17,664.

<sup>9</sup> *Mary Washington Female College v. McIntosh*, 37 Miss. 671.

able value of his services to that time.<sup>10</sup> There may also be cases, aside from contracts for personal services, where impossibility of performance arising from bankruptcy will justify the rescission or repudiation of the contract. Thus, it is said that an adjudication that a fire insurance company is insolvent will ipso facto cancel all existing policies on which no loss had previously occurred.<sup>11</sup>

**§ 327. Bankruptcy as Anticipatory Breach of Contract.** It was shown in an earlier part of this work that one of the parties to a contract may treat it as annulled or may rescind it when the other has placed himself in a situation where it is impossible for him to perform the uncompleted part of the contract, or has unequivocally stated his intention not to perform.<sup>12</sup> And it is held that the bankruptcy of a party is the equivalent of such disablement and repudiation, or may be treated as an anticipatory breach of the contract, so that if the bankrupt, at the time of the bankruptcy, by disabling himself from performing his part of a particular contract, and by repudiating its obligation, could give to the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such other party may prove his claim as a creditor in the bankruptcy proceedings.<sup>13</sup> In regard to the purchase and sale of goods, it is said that, "although the buyer's insolvency does not per se put an end to the contract, yet if the buyer has given notice to the seller of his insolvency, the latter is justified in treating the notice as a declaration of intention to repudiate the contract, and after the lapse of a reasonable time to allow the buyer's trustee to elect to complete the contract by paying the price in cash, the seller may, without tendering the goods to the trustee, consider the contract as broken, and prove against

<sup>10</sup> *In re Grubbs-Wiley Grocery Co.* (D. C.) 96 Fed. 183; *Ex parte Pollard*, 2 Low. 411, Fed. Cas. No. 11,252; *In re B. H. Gladding Co.* (D. C.) 120 Fed. 709; *In re McCarthy Portable Elevator Co.* (D. C.) 196 Fed. 247.

<sup>11</sup> *Todd v. German-American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94.

<sup>12</sup> *Supra*, §§ 203, 207.

<sup>13</sup> *In re Pettingill* (D. C.) 137 Fed. 143; *Black, Bankruptcy*, § 495.

the insolvent's estate for the damages arising from the breach."<sup>14</sup>

§ 328. **Executory and Option Contracts of Sale.**—The insolvency of a purchaser of property has sometimes been regarded as creating such an inability to perform on his part as will justify the seller in rescinding the contract, but it is not at all clear that this is always the case,<sup>15</sup> although a purchase of goods on credit by a person who is insolvent and knows he will not be able to pay for them, and with a secret intention not to pay, constitutes such a fraud as justifies rescission.<sup>16</sup> And the right of the insolvent purchaser to rescind the sale and return the goods to the unpaid vendor may depend on whether or not his doing so would create an unlawful preference in case of his subsequent adjudication in bankruptcy.<sup>17</sup> It is held that an executory contract for the sale and future delivery of personal property is not rescinded by the bankruptcy of the buyer before delivery, for his assignee or trustee in bankruptcy has the right to accept the contract and require its performance, and on the other hand, the vendor has the right to hold the goods until the date fixed for delivery, or until the trustee in bankruptcy has had a reasonable time in which to elect whether or not to take them, and then to treat the contract as broken and resell the goods.<sup>18</sup> But if goods are deliverable in successive installments, the trustee of the bankrupt purchaser cannot adopt the contract and claim further deliveries under it without paying the price of the goods delivered before the bankruptcy.<sup>19</sup>

Where the goods have been delivered to the purchaser before his bankruptcy, but are not paid for, and the contract gives him an option to acquire title by paying the price if he chooses, or else to return them, the title still remains in the seller, and he may treat the bankruptcy as

<sup>14</sup> 2 Benj. Sales, § 1119. And see *Morgan v. Bain*, L. R. 10 C. P. 15.

<sup>15</sup> *Supra*, § 207. And see 1 Wharton, Contracts, § 293.

<sup>16</sup> *Supra*, § 31.

<sup>17</sup> *In re Aspinwall* (D. C.) 11 Fed. 136; 1 Benj. Sales, p. 676.

<sup>18</sup> *Boorman v. Nash*, 9 Barn. & C. 145; *Ex parte Stapleton*, 10 Ch. Div. 586. And see *Tiernan v. Roland*, 15 Pa. 429.

<sup>19</sup> 2 Benj. Sales, § 1120.

a repudiation or breach of the contract and recover the goods or their proceeds from the trustee in bankruptcy.<sup>20</sup> But if the contract was one of unconditional sale, though with a privilege to the buyer to return the goods in case they proved unsatisfactory, then he has the title, and the seller cannot reclaim the goods from the trustee in bankruptcy, but simply becomes a creditor for the price.<sup>21</sup> So, where a purchaser of land under an executory contract draws a bill of exchange for the first payment thereunder, which is dishonored, and he is insolvent, the vendor may rescind and refuse to complete the sale.<sup>22</sup>

§ 329. **Conditional Sales.**—The effect of the bankruptcy of a purchaser of property under a contract of conditional sale is a highly technical subject, which has received a more extended discussion in various treatises on the law of bankruptcy than is possible in this place. Generally speaking, however, and laying aside the question of the rights and liabilities of the parties under an unrecorded contract of conditional sale, in jurisdictions where the local law requires the recording of such contracts, the rules of law may be summarized as follows: Property in the possession of a bankrupt under a contract of conditional sale, the condition not having been performed, does not vest in the trustee in bankruptcy, and he is not entitled to hold it as against the unpaid vendor. If no payment has been made on the price of the property, the vendor may reclaim it. If it has been paid for in part, he has a good and valid lien upon it for the unpaid balance of the purchase money. If it is likely to result in benefit to the estate, the trustee may pay such balance, and thereby become invested with full title to the property. Or the trustee may be ordered by the court to sell the property at public auction, and out of the proceeds to pay to the vendor the balance due him on the contract.<sup>23</sup>

<sup>20</sup> Colonial Trust Co. v. Thorpe, 194 Fed. 390, 114 O. C. A. 308; In re Schindler (D. C.) 158 Fed. 458; In re Miller & Brown (D. C.) 135 Fed. 871.

<sup>21</sup> In re Landis (D. C.) 151 Fed. 896.

<sup>22</sup> Todd v. Caldwell, 10 Tex. 236.

<sup>23</sup> Black, Bankruptcy, § 358.

**§ 330. Relation of Landlord and Tenant.**—There are some decisions to the effect that an adjudication in bankruptcy against a tenant of premises dissolves the lease and terminates the relation of landlord and tenant.<sup>24</sup> But the preponderance of authority is to the contrary. It is more generally held that the bankruptcy of a tenant does not sever the relation of landlord and tenant or annul the lease, but the lease continues and the tenant remains liable, and the obligation to pay rent is not discharged as to the future, unless the trustee in bankruptcy elects to retain the lease as an asset of the estate.<sup>25</sup> "The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession, and if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants, and from these he is not discharged in any event."<sup>26</sup> So, in a later case, it was said: "The trustee has a reasonable time to elect whether to assume or to refuse the lease. If he assumes it, the bankruptcy operates like any other assignment and would release the bankrupt from all liability for rent. If the trustee refuses to take the lease, the bankrupt remains the tenant as before. The adjudication in bankruptcy has the effect to transfer to the trustee all the property of the bankrupt except his executory contracts (such, for instance, as leases), and to vest in the trustee the option to assume or to renounce these."<sup>27</sup>

<sup>24</sup> *In re Hinckel Brewing Co.* (D. C.) 123 Fed. 942; *In re Hays, Foster & Ward Co.* (D. C.) 117 Fed. 879; *In re Jefferson* (D. C.) 93 Fed. 948; *Bray v. Cobb* (D. C.) 100 Fed. 270. The case last cited was reversed in *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, but on another ground.

<sup>25</sup> *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; *Watson v. Merrill*, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719; *In re Ells* (D. C.) 98 Fed. 967; *In re Pennewell*, 119 Fed. 139, 55 C. C. A. 571; *In re Mitchell* (D. C.) 116 Fed. 87; *Witthaus v. Zimmermann*, 91 App. Div. 202, 86 N. Y. Supp. 315.

<sup>26</sup> *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725. And see *White v. Griffing*, 44 Conn. 437.

<sup>27</sup> *In re Scruggs* (D. C.) 205 Fed. 673.

But leases sometimes contain an express provision to the effect that the lessor may declare a forfeiture and re-enter in case of bankruptcy proceedings against the lessee. Of such a provision it has been said: "Undoubtedly the parties to a lease may agree that bankruptcy shall terminate it, and that, upon such termination, all future installments of rent shall at once become due and payable. In such a case the installments may be regarded as consolidated by the contract, or perhaps as falling due by way of penalty. Not improbably claims based upon such leases are provable in bankruptcy." But even where a clause of this kind is inserted, "notwithstanding the provision that the lease should terminate in case the lessee should be declared bankrupt, and the lessor should have the right to re-enter, the lease was undoubtedly terminable by the re-entry and not by the bankruptcy. The lessor was not obliged to re-enter, and whether he would do so or not was manifestly dependent upon uncertainties."<sup>28</sup> It should be added that when a landlord becomes bankrupt, it seems that the lease is not dissolved nor in any way affected thereby.<sup>29</sup>

§ 331. **Election as to Rescission.**—One who has the right to rescind a contract of sale, on account of fraud practised by the buyer, may elect to affirm the contract instead of rescinding it, and will be held to have done so where he files a verified proof of claim on the contract in proceedings against the buyer under the bankruptcy law or under an assignment for the benefit of creditors.<sup>30</sup> And on the other hand, an election to rescind is final and conclusive when once unequivocally manifested. In a case in New York, the sellers of property brought an action to rescind the sale on the ground of fraud, and to recover possession of the goods from one to whom the defrauding buyer had transferred them with knowledge of the fraud. Pending this suit, the sellers proved their claim for the price of the goods against the estate in bankruptcy of the buyer, and

<sup>28</sup> *In re Roth & Appel*, 181 Fed. 667, 104 C. C. A. 849, 31 L. R. A. (N. S.) 270. And see *In re Larkey* (D. C.) 214 Fed. 867.

<sup>29</sup> *In re Hays, Foster & Ward Co.* (D. C.) 117 Fed. 879, 884.

<sup>30</sup> *Droege v. Ahrens & Ott Mfg. Co.*, 163 N. Y. 406, 57 N. E. 747.



on the trial it was claimed that the suit to be sustained because of this claim made. But the court said: "The plaintiffs maintain that their election was a nullity by bringing this action. After that election, redress was not open to them, for if a man makes an election, it shall be determined for him. He could never successfully assert a claim as a claimant under the contract, for the election had been manifested, and to revoke it was not allowed." <sup>81</sup>

<sup>81</sup> Moller v. Tuska, 87 N. Y. 166.

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